

08:57AM

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4
5 CISCO SYSTEMS, INC.,) CV-14-5344-BLF
6)
7 PLAINTIFF,) SAN JOSE, CALIFORNIA
VS.)
9 ARISTA NETWORKS, INC.,) SEPTEMBER 9, 2016
10)
DEFENDANT.) PAGES 1-107
11)
)

12 TRANSCRIPT OF PROCEEDINGS
13 BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

14
15 A P P E A R A N C E S:

16 FOR THE PLAINTIFF: SEAN SANG-CHUL PAK
JOHN NEUKOM
17 QUINN EMANUEL URQUHART & SULLIVAN, LLP
50 CALIFORNIA, FLOOR 22
18 SAN FRANCISCO, CA 94111

19 FOR THE PLAINTIFF: DAVID A. NELSON
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21 CHICAGO, IL 60661

22 APPEARANCES CONTINUED ON THE NEXT PAGE

23 OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

24
25 PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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7 DAVID SILBERT
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1 SAN JOSE, CALIFORNIA

SEPTEMBER 9, 2016

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS
4 WERE HELD:)

5 09:02AM THE COURT: ALL RIGHT. HELLO.

6 09:02AM AND I GUESS WE HAVE A LITTLE BIT OF A BIG TASK AHEAD OF US
7 09:02AM TODAY. AND I'VE DONE A LOT OF READING AND YOU ALL DID A LOT OF
8 WRITING, SO I REALLY APPRECIATE THAT.

9 09:02AM I SENT OUT AN ORDER LIMITING YOUR TIME, AND I KNOW I
10 09:02AM LIMITED IT TREMENDOUSLY, SO IF WE GO OVER A LITTLE BIT, I'M NOT
11 09:03AM GOING TO BE CUTTING YOU OFF LIKE I DO AT TRIAL. I JUST FELT
12 09:03AM THAT AT THE LAST HEARING I DIDN'T SET ANY PARAMETERS AND IT
13 09:03AM JUST GOT -- I DIDN'T CONTROL IT AND I SHOULD HAVE.

14 09:03AM SO THANK YOU FOR -- I KNOW YOU'VE GEARED YOUR PRESENTATIONS
15 09:03AM TO COMPLY WITH THAT TIME. AND AS I SAY, IF MY QUESTIONS SLOW
16 09:03AM US DOWN A LITTLE BIT THEN THAT WILL BE FINE AS WELL, I JUST
17 09:03AM WOULD LIKE TO WRAP THIS UP THIS MORNING AND THEN HAVE OUR
18 09:03AM CONFERENCE, WHICH IS ACTUALLY MORE IMPORTANT TO ME TODAY, I
19 09:03AM THINK, EVEN THAN THIS, BECAUSE YOUR BRIEFING HAS BEEN SO GOOD.

20 09:03AM BEFORE WE GET STARTED, I WANTED TO MAKE A FEW COMMENTS ON
21 09:03AM THE EXPERTS AND THE OPINIONS THAT I WAS MOST FOCUSED ON. AND I
22 09:03AM FOCUS ON THEM IF I MIGHT EXCLUDE, IF I'M GOING TO ALLOW IT IN,
23 09:03AM I ACTUALLY DON'T NEED TO MAKE COMMENTS.

24 09:03AM SO I HAVE MADE NO DECISIONS ON THIS FROM YOUR PAPERS, BUT
25 09:03AM IT MAY HELP YOU BECAUSE YOUR TIME IS LIMITED.

09:03AM 1 WITH THE EXPERTS, I THINK IT'S DR. BLACK, AND MR. SEIFERT
09:04AM 2 ON THE DE FACTO INDUSTRY STANDARD ISSUE, I HAVE REAL CONCERN
09:04AM 3 ABOUT HOW FUZZY THE STANDARD IS AND WHETHER THERE'S SOME LINE
09:04AM 4 THAT IS REASONABLE TO MARKET FROM BEING FULLY PROTECTED AND
09:04AM 5 ORIGINAL AND PROPRIETARY WITH THE COMPANY, AND IT'S ALWAYS
09:04AM 6 PROPRIETARY UNDER THE COPYRIGHT, BUT BECOMING A DE FACTO
09:04AM 7 STANDARD, I'M VERY CONCERNED ABOUT THAT SUBJECTIVE STANDARD.

09:04AM 8 WITH MR. SEIFERT, HIS MARKET EFFECT OPINION DOES NOT SEEM
09:04AM 9 TO BE BOUND IN ANY KIND OF MARKET SURVEY, AND I'M CONCERNED
09:04AM 10 ABOUT THE LIMITATION ON WHAT HE'S DONE TO LAY A FOUNDATION.

09:04AM 11 ON DR. ALMEROOTH, ON HIS SOURCE CODE COPYING OPINIONS, I
09:04AM 12 TRIED TO READ HIS COPYING EXHIBITS, THEY WERE A LITTLE BIT
09:05AM 13 BEYOND ME, SO YOU MIGHT BE FOCUSSING ME ON THAT ANYWAY, BUT IT
09:05AM 14 DOESN'T APPEAR -- WELL, LET ME BACK UP, THE WAY THAT ARISTA
09:05AM 15 COUCHED THE MOTION WAS ABOUT SOURCE CODE COPYING AND THE
09:05AM 16 OPPOSITION TALKS ABOUT OPINIONS REGARDING SIMILARITIES.

09:05AM 17 SO I DON'T KNOW WHETHER YOU ARE TALKING PAST EACH OTHER OR
09:05AM 18 ACTUALLY HIS OPINIONS ARE ONLY ABOUT SIMILARITIES. AND IF
09:05AM 19 THAT'S THE CASE, I'M NOT SURE HOW OR WHY THEY WOULD COME IN.

09:05AM 20 AND THEN WITH THE ELSTEN, CHEVALIER DAMAGES OPINIONS, WE DO
09:05AM 21 NEED TO TALK ABOUT THE PROPER LEGAL TEST ON CAUSAL NEXUS. BUT
09:05AM 22 I THINK MY BOTTOM LINE QUESTION THERE, THE ISSUE IS
09:05AM 23 DISGORGEMENT OF PROFITS, AND IT'S IN THE PAPERS, AND MY
09:05AM 24 EXPERIENCE IS THAT'S ONLY AN EQUITABLE CONSIDERATION FOR THE
09:05AM 25 COURT AND NOT THE JURY.

09:05AM 1 AND IF THAT'S IN FACT THE CASE, I'M NOT ACTUALLY SURE HOW
09:06AM 2 MUCH OF THIS I NEED TO FOCUS ON AT THIS POINT, AND IT MAY BE
09:06AM 3 THAT WHOLE DISCUSSION CAN BE DEFERRED UNTIL A POST-VERDICT
09:06AM 4 FINDING THAT WOULD BRING THIS DAMAGES ISSUE TO THE COURT.
09:06AM 5 IF IT ACTUALLY HAS A JURY ASPECT, PLEASE CORRECT ME, BUT IT
09:06AM 6 DIDN'T APPEAR THAT IT WOULD BASED ON THE WAY IT'S SET UP. BUT
09:06AM 7 THOSE ARE, AS I SAY, THOSE ARE ONLY A FEW THINGS. YOU HAVE
09:06AM 8 RAISED DOZENS MORE ISSUES AND THOSE WERE THE KEY THINGS THAT I
09:06AM 9 WAS CONSIDERING POTENTIAL EXCLUSION ON OR HAD REALLY NEEDED
09:06AM 10 MORE CLARITY.
09:06AM 11 SO WITH THAT I'M GOING TO STOP WITH MY COMMENTS SO THAT WE
09:06AM 12 CAN ACTUALLY GET TO YOUR PRESENTATIONS. AND I DON'T KNOW HOW
09:06AM 13 YOU HAVE EACH PLANNED TO MAKE YOUR PRESENTATION. IF YOU WANT
09:06AM 14 TO PRESENT ON YOUR OWN MOTIONS AND THEN WAIT AND RESERVE SOME
09:06AM 15 TIME TO OPPOSE THE ONES AGAINST YOUR OWN EXPERTS --
09:06AM 16 MR. PAK: YOUR HONOR, WE MET AND CONFERRED. WE
09:07AM 17 THOUGHT WE WOULD PING PONG BACK AND FORTH, SO WE WOULD PICK ONE
09:07AM 18 AND THEY WOULD REBUT, AND THEY WOULD PICK ONE.
09:07AM 19 THE COURT: OH, THAT WOULD BE MUCH MORE HELPFUL TO
09:07AM 20 ME. OKAY. THAT WORKS REALLY WELL. AND I BELIEVE CISCO HAD
09:07AM 21 THE BULK OF THE MOTIONS, SO WERE YOU GOING TO START, MR. PAK?
09:07AM 22 MR. PAK: YES. SO I'M GOING TO ACTUALLY INTRODUCE MY
09:07AM 23 PARTNER DAVID NELSON FOR THE PARTIES.
09:07AM 24 THE COURT: OKAY. I HAVE ALL KINDS OF NOTES AND
09:07AM 25 PAPERS HERE. AND YOU HAVE GIVEN ME SOME SLIDES WHICH I ALWAYS

09:07AM 1 APPRECIATE. THANK YOU. IT WILL REALLY HELP FOCUS ME ON THE
09:07AM 2 EVIDENCE YOU FIND MOST IMPORTANT.

09:07AM 3 MR. NELSON: THANK YOU, YOUR HONOR.

09:07AM 4 DAVE NELSON, TO INTRODUCE MYSELF ON BEHALF OF CISCO HERE,
09:07AM 5 IT'S A PLEASURE TO MEET YOU.

09:07AM 6 THE COURT: THANK YOU. GOOD TO SEE YOU.

09:07AM 7 MR. NELSON: THANK YOU. I DON'T HEAR THAT ALL THE
09:07AM 8 TIME, SO THANK YOU.

09:07AM 9 SO LET'S TALK ABOUT DR. BLACK, AND I WANT TO FOCUS IN ON
09:08AM 10 EXACTLY WHAT YOUR HONOR JUST SUGGESTED. SO WE HAVE THIS
09:08AM 11 TESTIMONY ABOUT DE FACTO INDUSTRY STANDARDS OR QUASI INDUSTRY
09:08AM 12 STANDARDS, THEY ARE STATED DIFFERENT WAYS.

09:08AM 13 SO JUST TO BE CLEAR, INITIALLY WE ARE -- CERTAINLY NO ONE
09:08AM 14 IS TALKING ABOUT TRUE INDUSTRY STANDARDS HERE WHICH IS THE KIND
09:08AM 15 OF THING WE HEAR ALL THE TIME WHERE THERE'S STANDARDS BODIES
09:08AM 16 THAT GET TOGETHER AND THEY FORMULATE BASICALLY TECHNICAL
09:08AM 17 SPECIFICATIONS SO DEVICES CAN WORK TOGETHER.

09:08AM 18 WE HEAR THAT IN THE CELL PHONE MARKET AND WITH BASE
09:08AM 19 STATIONS AND THINGS LIKE THAT ALL THE TIME. SO THAT'S NOT WHAT
09:08AM 20 WE ARE TALKING ABOUT HERE, AND THAT'S PART OF THE PROBLEM.

09:08AM 21 BECAUSE THE TEST THAT'S BEEN FORMULATED REALLY IS NO TEST
09:08AM 22 AT ALL, AND WHEN WE SEE HOW DR. BLACK APPLIED THAT TO HIS OWN
09:08AM 23 ANALYSIS, I THINK THAT'S REALLY ILLUSTRATED.

09:08AM 24 SO BEST I CAN SEE, AND IT COMES ACROSS A FEW PLACES IN HIS
09:08AM 25 REPORT, THE WAY DR. BLACK DEFINES INDUSTRY STANDARD IS, AND I

09:09AM 1 THINK HE, IT'S IN PARAGRAPH ONE 71 OF HIS REPORT FOR ONE PLACE,
09:09AM 2 BUT IT SAYS INDUSTRY STANDARD CLI, REFERS TO THE COMMON WELL
09:09AM 3 KNOWN AND WIDELY ADOPTED FEATURES AND FUNCTIONALITY OF CLI
09:09AM 4 SUPPORTED ACROSS MULTIPLE VENDORS'S NETWORKING DEVICES WITH
09:09AM 5 WHICH END USERS HAVE BECOME AND ARE FAMILIAR.

09:09AM 6 OKAY. WELL, RIGHT THERE WE ARE TALKING ABOUT SOMETHING
09:09AM 7 PRETTY FUZZY, RIGHT. IT'S VERY SUBJECTIVE, THERE'S NO REAL
09:09AM 8 OBJECTIVE CRITERIA. AND IF WE LOOK AT WHAT DR. BLACK DID, AND
09:09AM 9 WITHOUT GOING THROUGH ALL OF THESE SLIDES, THERE'S A COUPLE
09:09AM 10 THINGS THAT I REALLY WANT TO FOCUS ON.

09:09AM 11 HERE, YOUR HONOR, THIS WHOLE DEPOSITION, SOME OF THIS IS
09:09AM 12 DEPOSITION TESTIMONY HAS BEEN MARKED ATTORNEY'S EYES ONLY. SO
09:10AM 13 I DON'T KNOW -- I GUESS MAYBE TAKE IT OFF THE SCREENS AND MAKE
09:10AM 14 SURE IT'S ON YOUR SCREEN, AND I WILL TRY NOT TO --

09:10AM 15 THE COURT: YES. AND CERTAINLY IN A HEARING LIKE
09:10AM 16 THIS, I'M GLAD TO CLOSE OR EXCUSE PEOPLE FROM THE COURTROOM. I
09:10AM 17 ASSUME THESE ARE CORPORATE REPRESENTATIVES WHO ARE HERE. AND
09:10AM 18 IT'S UP TO YOU, MR. NELSON WHO STAYS AND WHO GOES.

09:10AM 19 MR. NELSON: YEAH. AND I THINK I WOULD DEFER, YOU
09:10AM 20 CAN SEE FROM THE SLIDES WHAT THAT TESTIMONY IS, RELATIVELY HIGH
09:10AM 21 LEVEL STUFF, AND IT'S FROM THEIR WITNESS.

09:10AM 22 THE COURT: THE SCREENS ARE OFF THAT THE AUDIENCE
09:10AM 23 COULD SEE. MY SCREEN IS ON AND I HAVE THE SLIDE DECK. IS
09:10AM 24 THERE ANY OBJECTION TO THE INDIVIDUALS IN THE COURTROOM
09:10AM 25 REMAINING?

09:10AM 1 MR. FERRALL: NO, YOUR HONOR.

09:10AM 2 THE COURT: OKAY. THEN LET'S PROCEED.

09:10AM 3 MR. NELSON: ALL RIGHT. THANK YOU, YOUR HONOR.

09:10AM 4 SO WITH THAT DEFINITION THAT I JUST READ, WHAT DR. BLACK

09:11AM 5 DOES INITIALLY IS LOOK AT SOME OF THE ASPECTS OF THE WORK, THE

09:11AM 6 CISCO CLI THAT CISCO, AND I'M SURE THAT THAT WILL COME UP LATER

09:11AM 7 AND WE CAN TALK ABOUT THAT IN MORE DETAIL, YOUR HONOR, BUT SOME

09:11AM 8 OF THE SPECIFIC ASPECTS. AND I WILL JUST TALK ABOUT THE

09:11AM 9 COMMANDS FIRST, THE MULTI-WORD COMMANDS.

09:11AM 10 SO THE FIRST THING IS THAT WHEN DR. BLACK GOES THROUGH

09:11AM 11 THIS, WHEN HE'S SUPPOSEDLY LOOKING FOR WIDESPREAD COMMON USAGE

09:11AM 12 OF THESE THINGS WITH WHICH USERS HAVE BECOME FAMILIAR, HE

09:11AM 13 EXCLUDES SOME OF WHAT HE ACKNOWLEDGES ARE MAJOR PLAYERS IN THE

09:11AM 14 INDUSTRY.

09:11AM 15 FOR EXAMPLE, THE JUNIPER OS. HE LOOKS AT JUNIPER BUT HE

09:11AM 16 LOOKS AT A VERSION OF THEIR OPERATING SYSTEM THAT IS NO LONGER

09:11AM 17 BEING SOLD, RIGHT. HE DOESN'T LOOK AT THE WIDESPREAD -- THE

09:11AM 18 ONE THAT'S BEING USED NOW.

09:11AM 19 SO THAT'S A BIG -- WHAT HE WOULD DEFINE TO BE A MAJOR

09:12AM 20 PLAYER IN THE INDUSTRY. NEXT HE EXCLUDES HUAWEI, ANOTHER ONE

09:12AM 21 HE SAYS IS A MAJOR PLAYER. HE ALSO EXCLUDES PEOPLE WHO USE

09:12AM 22 DIFFERENT KINDS OF USER INTERFACES. SO A CLI, STANDS FOR A

09:12AM 23 COMMAND LINE INTERFACE, ONE TYPE OF USER INTERFACE, KIND OF

09:12AM 24 LIKE THE OLD DOS PROGRAMS WHERE YOU TYPE IN CERTAIN COMMANDS

09:12AM 25 AND GET CERTAIN RESPONSES.

09:12AM 1 THE COURT: SO YOU HAVE TO GET ME OVER THE LINE OF
09:12AM 2 THIS JUST BEING PROPER CROSS-EXAMINATION.

09:12AM 3 MR. NELSON: ABSOLUTELY.

09:12AM 4 THE PROBLEM HERE IS, IS THERE SOMETHING THAT'S HELPFUL FOR
09:12AM 5 THE JURY, RIGHT. WE HAVE A TEST THAT HE HAS STATED, WE CAN'T
09:12AM 6 FIND IT IN THE LITERATURE, RIGHT, SO THERE'S NO PUBLICATIONS
09:12AM 7 AND NO MARKETING ANALYSIS. AND IN FACT, EVEN THAT LAST PIECE
09:12AM 8 WHICH I THINK IS THE CRUX OF HIS ISSUE, IS TO TRY TO SHOW THAT
09:12AM 9 CUSTOMERS HAVE SOMEHOW RELIED ON THAT. NOW I WILL SET ASIDE
09:13AM 10 WHETHER THAT'S EVEN RELEVANT TO ANY ISSUES FOR NOW, BUT LET'S
09:13AM 11 TAKE THAT AS A GIVEN, YOUR HONOR. THERE'S NO MARKET SURVEY
09:13AM 12 HERE THAT WAS DONE, THERE WAS NOTHING THAT SAYS, OH, OKAY, YOU
09:13AM 13 CUSTOMERS, YOU KNOW, YOU ALL THINK THIS IS THE COMMON WAY TO DO
09:13AM 14 IT.

09:13AM 15 AND YOU KNOW IF YOU EXCLUDE MAJOR PLAYERS WHO HE SAID
09:13AM 16 HIMSELF DON'T DO IT THAT WAY, RIGHT, IN FACT HE SAID THE REASON
09:13AM 17 WHY HE DIDN'T EXCLUDE THOSE IS THERE WOULDN'T HAVE BEEN ANY
09:13AM 18 OVERLAP IN THE COMMANDS.

09:13AM 19 SO WE KNOW THERE ARE OTHER WAYS THAT ARE OUT THERE THAT
09:13AM 20 SWITCHES ARE SELLING. SO IF YOU ARE GOING TO USE THAT AS A
09:13AM 21 TEST, THAT CUSTOMERS EXPECT THIS, AND THAT'S PART OF HIS TEST
09:13AM 22 THAT I JUST READ, RIGHT, USE CUSTOMERS WHO PURCHASE AND USE
09:13AM 23 SUCH DEVICES HAVE BECOME AND ARE FAMILIAR.

09:13AM 24 WELL, THAT TEST PRESUMES, EVEN HIS OWN TEST, BEING AS
09:13AM 25 SUBJECTIVE AS IT IS, PRESUMES THERE WOULD BE SOME TYPE OF

09:13AM 1 ANALYSIS LIKE THAT.

09:14AM 2 AND THERE ISN'T. THERE'S MERELY A SURVEY TO GO THROUGH AND

09:14AM 3 COUNT, I'M STICKING WITH THE MULTI-WORD COMMANDS, HOW MANY

09:14AM 4 TIMES HE SEES THESE IN CERTAIN DEVICES.

09:14AM 5 NOW IN THE CHARTS THAT ARE INCLUDED, AND THAT'S LARGELY IN

09:14AM 6 EXHIBIT G IN THE MATERIALS AND TO HIS REPORT, IT'S ABOUT 20

09:14AM 7 THAT HE LOOKS AT. AND CERTAINLY THERE ARE SOME OF THESE

09:14AM 8 COMMANDS --

09:14AM 9 THE COURT: 20 VENDORS.

09:14AM 10 MR. NELSON: YEAH, SOMEWHERE RIGHT AROUND THERE, I

09:14AM 11 DON'T REMEMBER THE EXACT NUMBER.

09:14AM 12 THE COURT: NOT 20 COMMAND LINES, I JUST WANT TO BE

09:14AM 13 CLEAR ON THE RECORD.

09:14AM 14 MR. NELSON: CORRECT. IN TERMS OF COMMANDS, HE

09:14AM 15 LOOKED AT 400 SOMETHING THAT WERE LISTED IN THERE. THERE WERE

09:14AM 16 50 SOME OF THE CURRENT SET OF 508 THAT I THINK YOUR HONOR HAS

09:14AM 17 HEARD THAT NUMBER A FEW TIMES, THAT HE DIDN'T LOOK AT THAT AT

09:14AM 18 ALL AND THAT'S BECAUSE NOBODY USED THEM, AND IT IS, WELL, THAT

09:14AM 19 NUMBER WOULD HAVE BEEN ZERO.

09:14AM 20 BUT IF YOU LOOK AT THAT AND IF WE CAN GO TO THE LAST SLIDE,

09:15AM 21 YOUR HONOR, AND I DON'T KNOW IF MY EYES ARE THAT GOOD ANYMORE,

09:15AM 22 BUT YOU WILL SEE HERE, THIS IS JUST AN EXAMPLE, WE HAVE MANY,

09:15AM 23 MANY COMMANDS LISTED HERE WHERE THE NUMBERS ARE 3 AND 2 AND 1,

09:15AM 24 AND THEN WE KNOW THAT THERE'S MANY THAT ARE ZERO AS WELL.

09:15AM 25 SO -- BUT THERE'S NO STATEMENT AS TO WHETHER THESE

09:15AM 1 EXAMPLES, THESE ASPECTS OF THE WORK ARE THINGS THAT UNDER
09:15AM 2 DR. BLACK'S TEST, HE WOULD CONTEND TO BE "DE FACTO INDUSTRY
09:15AM 3 STANDARD" VERSUS NOT DE FACTO INDUSTRY STANDARD.

09:15AM 4 SO I UNDERSTAND, YOUR HONOR, THAT OFTEN TIMES, AND THIS
09:15AM 5 HAPPENS WITH EXPERT TESTIMONY, YOU MAY NOT HAVE A TRUE BRIGHT
09:15AM 6 LINE LIKE WHEN YOU HAVE 22 OF 27 THAT MEETS MY TEST, RIGHT, I
09:16AM 7 UNDERSTAND THAT YOU DON'T HAVE THAT, BUT WE AT LEAST HAVE SOME
09:16AM 8 KIND OF BALLPARK, SOME KIND OF PARAMETERS ON THERE THAT IT
09:16AM 9 WOULD BE ABOUT A THIRD, THOSE KINDS OF THINGS.

09:16AM 10 AND WHAT WE HAVE HERE IS REALLY NOTHING. THERE'S NO
09:16AM 11 COMMITMENT IN TERMS OF THE TESTIMONY FROM THE WITNESS AS TO
09:16AM 12 WHEN CERTAIN ASPECTS, RIGHT, WOULD BE THIS DE FACTO STANDARD --
09:16AM 13 THE COURT: SO -- AND MAYBE THIS IS A QUESTION FOR
09:16AM 14 ARISTA, BUT THE WAY YOU BREAK IT DOWN, THEN I WOULD ACTUALLY BE
09:16AM 15 LOOKING -- I MIGHT FIND THAT ONE COMMAND LINE IS UNIVERSALLY
09:16AM 16 USED, BUT DO I HAVE TO LOOK AT EACH ONE?
09:16AM 17 BECAUSE THROUGHOUT THIS CASE, I'M BEING GIVEN WHAT YOU
09:16AM 18 MIGHT CALL A COMPILATION OR WHAT MIGHT BE, OR SOMETHING, BUT IS
09:16AM 19 IT -- BUT IF DR. BLACK IS TELLING ME THAT CISCO CLI IS THE DE
09:16AM 20 FACTO STANDARD BUT YOU ARE SAYING THAT HIS OWN EVIDENCE SHOWS
09:17AM 21 THAT CERTAIN ELEMENTS ARE CISCO CLI ARE RARELY CARRIED OVER TO
09:17AM 22 OTHER VENDORS OF THESE SWITCHES, I'M LEFT WITH NOT KNOWING WHAT
09:17AM 23 UNIVERSE I'M LOOKING AT, IF I'M DECIDING DE FACTO STANDARD
09:17AM 24 ELEMENT-BY-ELEMENT OR AS A WHOLE IF 20 PERCENT OF THE INDUSTRY
09:17AM 25 USES OR ADOPTED 80 PERCENT OF CISCO'S CLI -- AND I'VE MADE

09:17AM 1 THOSE NUMBERS UP --

09:17AM 2 MR. NELSON: AND THAT'S A VERY GOOD QUESTION,

09:17AM 3 YOUR HONOR, AND THAT'S PART OF THE PROBLEM IS THAT HE DOESN'T

09:17AM 4 TELL US, RIGHT.

09:17AM 5 SO THE WORK, AS I THINK THERE WAS SOME RECENT BRIEFING THAT

09:17AM 6 WE TALKED ABOUT, THE WORK THAT WE ARE TALKING ABOUT HERE IS THE

09:17AM 7 CLI, WHICH IS A USER INTERFACE, IT'S THE WAY TO DO IT, THAT'S

09:17AM 8 THE WAY THE USER INTERACTS WITH THE PROGRAM.

09:17AM 9 NOW WE, CISCO, HAVE IDENTIFIED CERTAIN ASPECTS, THAT USER

09:18AM 10 INTERFACE, RIGHT, THAT WE BELIEVE ARE NOT ONLY PROTECTABLE BUT

09:18AM 11 ARE ASPECTS OF THINGS THAT ARISTA HAS COPIED, RIGHT, USED,

09:18AM 12 SUBSTANTIALLY SIMILAR, THOSE TYPES OF THINGS.

09:18AM 13 SO IT WOULD BE SIMILAR IF YOU HAD A BOOK, RIGHT, IF WE HAVE

09:18AM 14 A BOOK -- AND I KEEP GOING BACK TO THAT BECAUSE THIS IS ONE OF

09:18AM 15 THE THINGS I KNOW ARE COPYRIGHTED OR CAN BE, YOU COULD GO

09:18AM 16 THROUGH WORD-BY-WORD OR LINE-BY-LINE OR SENTENCE-BY-SENTENCE TO

09:18AM 17 SAY THIS SENTENCE IS COPIED, THIS SENTENCE ISN'T AND TABULATE

09:18AM 18 THOSE THINGS.

09:18AM 19 THERE ARE CERTAIN ASPECTS LIKE HOW THE CHARACTERS ARE

09:18AM 20 DEVELOPED AND THOSE KINDS OF THINGS, THEN THERE'S A QUESTION OF

09:18AM 21 WHETHER THERE'S SUBSTANTIAL SIMILARITY AND A DETERMINATION

09:18AM 22 MADE, WHICH IS A FACTUAL DETERMINATION.

09:18AM 23 SO THERE ARE SOME STATEMENTS IN DR. BLACK'S REPORT WHERE HE

09:18AM 24 INDICATES THAT HE MAY BE TALKING ABOUT THE CISCO CLI AS A

09:19AM 25 WHOLE, RIGHT. BUT THEN THE TEST BECOMES EVEN WORSE BECAUSE WE

09:19AM 1 KNOW HE DIDN'T LOOK AT SOME OF THE ASPECTS, RIGHT, LIKE THE
09:19AM 2 HELP DESCRIPTIONS, FOR EXAMPLE, OF THE ASSERTED ELEMENTS.
09:19AM 3 AND WE ALSO KNOW BY HIS OWN STATEMENTS IN THE DEPOSITION
09:19AM 4 WHERE HE SAYS IF HE WERE DOING THE ANALYSIS, IN OTHER WORDS, IF
09:19AM 5 I WERE TRYING TO LOOK TO SEE WHETHER THE CLI WAS AS A WHOLE WAS
09:19AM 6 INDUSTRY STANDARD, I WOULD LOOK AT DIFFERENT THINGS, RIGHT.
09:19AM 7 BUT WE DON'T KNOW WHAT THOSE DIFFERENT THINGS ARE.
09:19AM 8 SO WHAT HE'S FOCUSED IN, AND I UNDERSTAND ARISTA'S
09:19AM 9 CONTENTION IS I FOCUSED ON THOSE THINGS BECAUSE THOSE ARE THE
09:19AM 10 ASPECTS THAT CISCO IS ALLEGING, YOU KNOW, IN TERMS OF THOSE ARE
09:19AM 11 WHERE THE SUBSTANTIAL SIMILARITIES ARE IN THE WORK, THAT'S
09:19AM 12 FINE, EXCEPT FOR THE FACT THAT WE NOW HAVE A GENTLEMAN THAT'S
09:19AM 13 OFFERING TESTIMONY ON THIS DE FACTO INDUSTRY STANDARD WHERE WE
09:20AM 14 DON'T KNOW, ONE, EVEN WHERE THE BALLPARK IS, WHEN DOES
09:20AM 15 SOMETHING HAVE ENOUGH SIMILARITY WITH OTHER THINGS OUT THERE IN
09:20AM 16 THE MARKETPLACE SUCH THAT IT BECOMES A DE FACTO STANDARD, AND
09:20AM 17 WHEN IT DOES NOT. WE DON'T KNOW THIS GENTLEMAN'S OPINION AS TO
09:20AM 18 WHAT THOSE THINGS ARE THAT SHOULD BE COMPARED, BECAUSE WE KNOW
09:20AM 19 FROM HIS DEPOSITION TESTIMONY, HE SAYS AS AN EXPERT IN THIS
09:20AM 20 AREA, IN OTHER WORDS, I WILL JUST USE THE TERM SCIENTIFIC AND
09:20AM 21 ENGINEER, HE WOULD LOOK AT DIFFERENT THINGS, RIGHT.
09:20AM 22 SO WE HAVE SOMEBODY THAT'S -- HE'S OFFERING AN AMORPHOUS
09:20AM 23 OPINION OF CERTAIN ELEMENTS THAT IS CISCO IS CLAIMING. AND
09:20AM 24 SAYS, I FIND THOSE TO BE COMMON BUT WE DON'T KNOW WHERE THE
09:20AM 25 LINE IS OR EVEN THE BALLPARK IS TO WHEN THOSE ELEMENTS

09:20AM 1 THEMSELVES BECOME COMMON ENOUGH IN HIS MIND THAT CUSTOMERS ARE
09:20AM 2 FAMILIAR AND WANT THOSE, AS OPPOSED -- AND THEN FURTHER, WE
09:21AM 3 DON'T KNOW IF HE'S TALKING ABOUT THE CONGLOMERATION OF THESE
09:21AM 4 THINGS THAT CISCO POINTS TO, AND HOW THOSE COMPARE TO WHEN
09:21AM 5 SOMETHING WOULD BECOME WHAT HE SAYS IS AN INDUSTRY STANDARD
09:21AM 6 USER INTERFACE AS A WHOLE VERSUS NOT.

09:21AM 7 WHAT WE KNOW IS -- WHAT HE'S OFFERING IS TO SAY, OKAY,
09:21AM 8 CISCO IS POPULAR, CISCO IS, YOU KNOW, HAS SPENT TIME DEVELOPING
09:21AM 9 A PLACE IN THE MARKET AND MANY CUSTOMERS ARE FAMILIAR WITH WHAT
09:21AM 10 CISCO IS DOING, AND SOME OF THOSE THINGS REPEAT. BUT THAT'S
09:21AM 11 NOT HELPFUL TESTIMONY TO A JURY, RIGHT.

09:21AM 12 THE COURT: SO HERE'S -- I THINK THAT A COUPLE THINGS
09:21AM 13 CAME OUT IN THE OPPPOSITION, AND IT WAS REALLY IN RESPONSE TO
09:21AM 14 YOUR ARGUMENT THAT THE OPINION IS NOT RELEVANT.

09:21AM 15 AND WHAT ARISTA ARGUES IS THEY IDENTIFY THE SPECIFIC
09:21AM 16 ASPECTS OF THE CASE THAT DR. BLACK'S TESTIMONY WOULD BE
09:22AM 17 RELEVANT TO. AND CERTAINLY IT WAS ACKNOWLEDGED BY ARISTA THAT
09:22AM 18 A DE FACTO STANDARD DOESN'T MEAN IT'S FREE TO THE REST OF THE
09:22AM 19 INDUSTRY. SO THAT'S NOT WHAT WE ARE TALKING ABOUT HERE.

09:22AM 20 BUT GIVEN THAT ARISTA HAS ACKNOWLEDGED RELEVANCE TO FAIR
09:22AM 21 USE, ESTOPPEL AND DAMAGES, AND I WOULD CERTAINLY, IF I ALLOW
09:22AM 22 THE TESTIMONY, WOULD ALLOW YOU TO PREPARE A LIMITING
09:22AM 23 INSTRUCTION SO THAT THE JURY UNDERSTANDS THAT, AND OF COURSE
09:22AM 24 ESTOPPEL IS NOT GOING TO THE JURY, DAMAGES MIGHT, FAIR USE
09:22AM 25 WILL, PRESUMABLY, IT'S A JURY ISSUE.

09:22AM 1 THAT, IN A SENSE, CUSHIONS THE BLOW ON THE TESTIMONY OR
09:22AM 2 GIVES, IN MY VIEW, THE COURT, A LITTLE MORE LATITUDE TO ALLOW
09:22AM 3 IT IN BECAUSE IT'S SO DIRECTED TO A PARTICULAR PART OF THE
09:22AM 4 CASE.

09:22AM 5 AND SO I WANTED YOUR COMMENT ON THAT.

09:22AM 6 MR. NELSON: AND I UNDERSTAND AT LEAST CONCEPTUALLY
09:23AM 7 HOW THOSE THINGS MAY BE ARGUED. BUT WHAT WOULD BE ARGUED TO BE
09:23AM 8 THE FAIR USE DEFENSE WOULD BE THE FACTS OUT THERE.

09:23AM 9 FOR EXAMPLE, IF YOU HAD SOMETHING WHERE CUSTOMERS HAVE
09:23AM 10 BECOME FAMILIAR AND CUSTOMERS EXPECT THESE THINGS AND THEY ARE
09:23AM 11 USING THESE THINGS AND THERE MAY BE EVIDENCE THAT, AS THEY HAVE
09:23AM 12 ALLEGED OR THEY WANT TO OFFER, THAT CISCO WOULD ENCOURAGE THAT
09:23AM 13 KIND OF THING, PERHAPS YES, ON THOSE FACTS YOU COULD ARGUE FAIR
09:23AM 14 USE.

09:23AM 15 BUT THAT'S NOT WHAT WE ARE DOING HERE. WHAT THEY ARE
09:23AM 16 TRYING TO SAY IS HAVE A GENTLEMAN GET UP THERE UNDER THE GUISE
09:23AM 17 OF BEING A PHD, WE WILL CALL HIM DOCTOR, WHICH RIGHT THERE
09:23AM 18 GENERALLY LENDS ITSELF SOME CREDENCE WITH THE JURY, TO SAY THIS
09:23AM 19 HAS BECOME AN INDUSTRY STANDARD, RIGHT, DE FACTO INDUSTRY
09:23AM 20 STANDARD.

09:23AM 21 WE KNOW THERE ARE INDUSTRY STANDARDS IN A TOTALLY DIFFERENT
09:23AM 22 CONTEXT --

09:24AM 23 THE COURT: SO IEEE DEFINES DE FACTO INDUSTRY
09:24AM 24 STANDARD, CORRECT.

09:24AM 25 MR. NELSON: IEEE SAYS, I DON'T THINK THAT I WOULD,

09:24AM 1 THAT THEY NECESSARY HAVE A DEFINITION ABOUT WHAT SOMETHING IS.

09:24AM 2 BUT IN THE CONTEXT THEY ARE TALKING ABOUT IS AGAIN, AS AN

09:24AM 3 INTEROPERABILITY ISSUE, RIGHT.

09:24AM 4 SO THEY USE AN EXAMPLE, DR. BLACK, I KNOW IN HIS EXPERT

09:24AM 5 REPORT, USES AN EXAMPLE OF THIS INTERNET PROTOCOL, TCP IP. AND

09:24AM 6 FRANKLY, THERE WAS A FORUM THAT GOT TOGETHER AND DECIDED WHAT

09:24AM 7 THE PROTOCOLS WERE GOING TO BE, BUT EVEN IF WE DIDN'T HAVE THAT

09:24AM 8 IN ORDER TO TALK TO EACH OTHER THESE SYSTEMS WOULD NEED TO USE

09:24AM 9 THAT PROTOCOL OTHERWISE THEY CAN'T TALK TO EACH OTHER.

09:24AM 10 YOU MAY NOT HAVE THE INDUSTRY PLAYERS GETTING TOGETHER AND

09:24AM 11 FORMALLY SAYING THIS IS WHAT THE STANDARD IS AND DEFINING IT,

09:24AM 12 BUT BY USAGE YOU COULD HAVE THAT.

09:24AM 13 WE DON'T HAVE THAT AT ALL HERE, RIGHT. THERE'S NO

09:24AM 14 ALLEGATION, IN FACT THERE'S ADMISSION THAT YOU DON'T NEED TO

09:25AM 15 USE THIS USER INTERFACE IN ORDER TO HAVE YOUR SWITCHES OPERATE

09:25AM 16 TOGETHER. SO IT'S NOT AN INTEROPERABILITY ISSUE, RIGHT.

09:25AM 17 WHAT THE ALLEGATION IS RATHER, IS USERS ARE FAMILIAR,

09:25AM 18 RIGHT, SO IN OTHER WORDS IT'S KIND OF LIKE A LANGUAGE, IF YOU

09:25AM 19 GET USED TO SPEAKING A CERTAIN LANGUAGE, YOU LIKE TO SPEAK THAT

09:25AM 20 LANGUAGE AND MAYBE YOU DON'T WANT TO LEARN A NEW LANGUAGE OR

09:25AM 21 YOU DON'T WANT TO LEARN SOME NEW VOCABULARY, SO WE WILL USE

09:25AM 22 THAT ANY WAY.

09:25AM 23 BUT WE KNOW THAT ISN'T A REQUIREMENT IN THIS INDUSTRY

09:25AM 24 BECAUSE WE HAVE MAJOR INDUSTRY PLAYERS LIKE THE JUNIPER OS AND

09:25AM 25 HUAWEI AND SOME OF THE OTHERS THAT DON'T USE THAT AND THEY ARE

09:25AM 1 VERY PROMINENT PLAYERS IN THE EITHER NET SWITCH MARKET.

09:25AM 2 SO THAT, I THINK IS A VERY DIFFERENT, AND FRANKLY A

09:25AM 3 MISLEADING USE OF THE IEEE DEFINITION. AND WHEN WE HAVE

09:25AM 4 SOMEBODY WITH THE TITLE OF DOCTOR AND EXPERT AND QUALIFIED BY

09:26AM 5 THE COURT, ALL THOSE THINGS WOULD HAPPEN --

09:26AM 6 THE COURT: SO MR. SEIFERT WOULD BE BETTER, IN YOUR

09:26AM 7 MIND, TO GO FORWARD ON THIS BECAUSE HE DOESN'T HAVE THE

09:26AM 8 DOCTORATE.

09:26AM 9 MR. NELSON: THAT'S A FAIR POINT, BUT NO.

09:26AM 10 SO WITHOUT ANY REAL PARAMETERS ON THIS -- SO I DON'T

09:26AM 11 NECESSARILY HAVE A PROBLEM WITH THE GENTLEMAN OFFERING THE

09:26AM 12 FACTS, I LOOKED AT THESE THINGS AND THIS IS HOW MANY TIMES I

09:26AM 13 SEE THESE COMMANDS, RIGHT. I DON'T NECESSARILY HAVE A PROBLEM

09:26AM 14 WITH THAT. I'M NOT SURE WHERE THAT FALLS, BUT I GUESS, YOU

09:26AM 15 KNOW, IT'S ANALYSIS THAT WAS DONE FOR PURPOSES OF THE CASE AND

09:26AM 16 COULD BE EXPERT TESTIMONY. BUT TO DRAW THE CONCLUSION THAT

09:26AM 17 THIS IS SOMEHOW A DE FACTO INDUSTRY STANDARD --

09:26AM 18 THE COURT: SO IF DR. BLACK HAD TO COUCH HIS OPINION

09:26AM 19 BASED ON THESE, THE FACTS AS HE OBSERVED THEM TO SHOW THAT THE

09:27AM 20 USAGE IS COMMON OR FREQUENT, THAT'S --

09:27AM 21 MR. NELSON: I THINK THAT'S A VERY DIFFERENT

09:27AM 22 SITUATION.

09:27AM 23 THE COURT: OKAY.

09:27AM 24 AND I WILL ASK, I WON'T ASK YOU THIS, I JUST DON'T KNOW

09:27AM 25 THAT THIS CONCEPT OF DE FACTO INDUSTRY STANDARD HAS EVER BEEN

09:27AM 1 USED AS A DEFENSE IN A COPYRIGHT CASE LIKE THIS. SO I HAVE --

09:27AM 2 I WILL ASK ARISTA THAT, THAT'S NOT YOUR --

09:27AM 3 MR. NELSON: I'M NOT AWARE OF ONE, YOUR HONOR.

09:27AM 4 THE COURT: I DON'T THINK YOU WOULD BE.

09:27AM 5 MR. NELSON: NO.

09:27AM 6 SO -- AND IN A CRUX, THAT REALLY IS THE ISSUE WITH THAT

09:27AM 7 THE COURT: IT'S A BIG HEAVY TITLE TO CALL IT A DE

09:27AM 8 FACTO INDUSTRY STANDARD.

09:27AM 9 SO I CERTAINLY APPRECIATE PUTTING ASIDE THE PERSUASIVENESS

09:27AM 10 OF A QUALIFIED EXPERT GETTING ON THE WITNESS STAND, THAT I DO

09:27AM 11 AGREE WITH YOU THAT EXPERTS HAVE A LOT OF SWAY WITH JURORS,

09:27AM 12 THAT'S WHY YOU BRING THEM IN. BUT THIS TITLE IS PRETTY HEAVY

09:27AM 13 DUTY.

09:27AM 14 AND EVEN THOUGH THE PARTIES, ARISTA AGREES THAT THEY ARE

09:28AM 15 NOT SUGGESTING THAT BY BECOMING DE FACTO IT'S BECOME FREE, THE

09:28AM 16 JURY MAY NOT EVER PICK UP THAT NUANCE.

09:28AM 17 AND SO I APPRECIATE THIS UNSTATED PREJUDICE THAT COULD BE

09:28AM 18 OUT THERE THAT ARISTA WOULD NEVER ARGUE IT'S FREE, I'M SURE

09:28AM 19 THEY WOULDN'T, IT'S NOT THE LAW, BUT I SHARE YOUR CONCERN THAT

09:28AM 20 A JURY MIGHT NOT PICK UP ON THAT.

09:28AM 21 MR. NELSON: PARTICULARLY WHEN THE MOST LIKELY

09:28AM 22 THING WHEN A JURY WOULD HEAR THE TERM "INDUSTRY STANDARD," IS

09:28AM 23 THE KIND OF THING THAT WE HEAR BACK AND FORTH WHERE PEOPLE CAN

09:28AM 24 USE, IN FACT, IT'S EXPECTED THAT THEY ALL USE THOSE INTERFACES.

09:28AM 25 SETTING ASIDE ANY COMPENSATION, I'M NOT TALKING ABOUT FRAND,

09:28AM 1 YOUR HONOR.

09:28AM 2 THE COURT: NO, NO, I UNDERSTAND THAT.

09:28AM 3 MR. NELSON: SO WITH THAT I WILL MOVE ON.

09:28AM 4 THE COURT: GOOD. AND I SLOWED DOWN, TOO, SO WE

09:28AM 5 REALLY HAVE TO KEEP MOVING.

09:28AM 6 WHO IS GOING TO, FOR ARISTA, GOING TO TAKE THIS?

09:28AM 7 MR. FERRALL: YOUR HONOR, I'M GOING TO START, BUT I

09:28AM 8 WOULD ACTUALLY, BECAUSE IT COVERS BOTH EXPERTS AND I'M TALKING

09:29AM 9 ABOUT MR. SEIFERT, AND MR. WONG IS TALKING ABOUT DR. BLACK, WE

09:29AM 10 ARE GOING TO SPLIT THIS A LITTLE BIT, BUT I WANT TO START IF I

09:29AM 11 CAN.

09:29AM 12 THE COURT: SURE. LET ME JUST TELL YOU THAT MY VERY

09:29AM 13 FIRST QUESTION IS HAS AN OPINION REGARDING DE FACTO INDUSTRY

09:29AM 14 STANDARD EVER, TO YOUR KNOWLEDGE, BEEN PUT FORTH AT A TRIAL TO

09:29AM 15 ADDRESS THE ISSUES OF FAIR USE?

09:29AM 16 AND I'M NOT AS CONCERNED ABOUT ESTOPPEL BECAUSE THAT WILL

09:29AM 17 COME TO ME AND I COULD AGREE OR DISAGREE WITH THE OPINION, I'M

09:29AM 18 NOT GOING TO WORRY ABOUT THAT, DAMAGES OR FAIR USE?

09:29AM 19 MR. FERRALL: NOT THAT I KNOW OF, YOUR HONOR. I'M

09:29AM 20 NOT AWARE.

09:29AM 21 AND TO BE FAIR, DE FACTO STANDARDS DON'T ARISE THAT OFTEN.

09:29AM 22 WE HAVE EXAMPLES, MR. SEIFERT HAS LAID OUT IN HIS REPORT SOME

09:29AM 23 HISTORICAL EXAMPLES OF HOW TECHNOLOGIES HAVE BECOME DE FACTO

09:29AM 24 STANDARDS.

09:29AM 25 THE COURT: BECAUSE TO ME THIS IS HIGHLY RELEVANT TO

09:29AM 1 THE ISSUE OF ESTOPPEL. BUT I'M PUTTING THAT COMPLETELY ASIDE
09:30AM 2 NOW BECAUSE THAT'S NOT A JURY ISSUE.

09:30AM 3 MR. FERRALL: RIGHT.

09:30AM 4 THE COURT: SO I'M JUST VERY CONCERNED, THIS IS A
09:30AM 5 POWERFUL OPINION THAT COULD MEAN SOMETHING VERY DIFFERENT TO A
09:30AM 6 LAY JURY. AND I DON'T KNOW WHEN IT BECOMES -- AS I SAID, THIS
09:30AM 7 IS JUST SO FUZZY TO ME.

09:30AM 8 SO I KNOW IT WHEN I SEE IT, IS REALLY WHAT I GLEAN FROM
09:30AM 9 DR. BLACK, AND MR. SEIFERT IS THAT I LOOKED AT IT ALL AND I
09:30AM 10 THINK CISCO USES THIS BLACK BOX ANALOGY, THEY COMMENT ON IT,
09:30AM 11 AND, YOU KNOW, I LOOKED AT IT ALL, I SHOOK IT AROUND AND YEAH,
09:30AM 12 TO ME IT LOOKS LIKE IT'S BECOME DE FACTO, WITHOUT ANY
09:30AM 13 PERCENTAGES PUT ON IT.

09:30AM 14 AND I KNOW IT'S NOT A BRIGHT LINE, I DON'T MEAN TO SUGGEST
09:30AM 15 THAT, BUT IN SO MANY AREAS OF THE LAW, WE START LOOKING AT
09:30AM 16 SOMETHING APPROACHING 20 PERCENT, 30 PERCENT, SOME NUMBER THAT
09:30AM 17 BEGINS TO TELL US THAT IT'S WIDELY USED.

09:30AM 18 I DON'T HAVE ANY QUANTIFICATION THAT I CAN EVEN LOOK AT OR
09:30AM 19 THAT A JURY COULD REACT TO.

09:31AM 20 MR. FERRALL: LET ME CLARIFY A COUPLE OF THINGS, AND
09:31AM 21 MR. WONG WILL ELABORATE ON THIS.

09:31AM 22 BUT THE NOTION OF THE CISCO CLI, WHICH OF COURSE IS
09:31AM 23 SOMETHING WE HAVE TALKED ABOUT BEFORE AND I'M SURE WE WILL TALK
09:31AM 24 ABOUT AGAIN, AS A DE FACTO INDUSTRY STANDARD, THOSE ARE WORDS
09:31AM 25 THAT COME FROM CISCO, TO BE CLEAR. THERE ARE PLENTY OF CISCO

09:31AM 1 DOCUMENTS, AND WE WILL SHOW YOU EXAMPLES OF CISCO CALLING THEIR
09:31AM 2 CLI A DE FACTO INDUSTRY STANDARD.

09:31AM 3 THERE ARE EXAMPLES OF OTHER INDUSTRY VENDORS CALLING THE
09:31AM 4 CISCO CLI A DE FACTO INDUSTRY STANDARD.

09:31AM 5 SO WHEN IT COMES TO THE POWER OF THAT PHRASE, THAT'S A
09:31AM 6 PHRASE THAT'S COMING INTO THE CASE NO MATTER WHAT BECAUSE CISCO
09:31AM 7 HAS USED IT AND OTHERS HAVE USED IT.

09:31AM 8 THE COURT: SO THEN WE ARE TALKING ABOUT THE
09:31AM 9 COMPILATION THAT CISCO HAS DEFINED AS CISCO CLI AS A WHOLE.

09:32AM 10 MR. FERRALL: IT'S A GENERAL COMMENT, RIGHT.

09:32AM 11 THE COURT: BUT CISCO CLI IS A THING, IT'S A
09:32AM 12 COMPILATION, IT HAS BOUNDARIES. AND IF IT DOESN'T HAVE
09:32AM 13 BOUNDARIES, THEN I THINK THIS CASE IS GOING IN A WHOLE
09:32AM 14 DIFFERENT DIRECTION.

09:32AM 15 SO I AM PERSUADED THAT CISCO HAS PRESENTED THE BOUNDARIES
09:32AM 16 OF CISCO CLI, AND YOU CAN BE OR ARE INTIMATELY AWARE OF WHAT
09:32AM 17 EACH OF THE FEATURES AND ELEMENTS OF CISCO CLI IS, WHETHER IT'S
09:32AM 18 A LAWYER CONSTRUCT OR NOT IS NOT MY CONCERN NOW.

09:32AM 19 SO I READ DR. BLACK'S OPINIONS TO BE TALKING ABOUT CISCO
09:32AM 20 CLI AS A WHOLE AND LOOKING AT INDIVIDUAL, I DON'T THINK HE USES
09:32AM 21 THE WORD SPOT CHECKING, SO I DON'T WANT TO PUT THAT ON HIM, BUT
09:32AM 22 EVALUATING THE INDIVIDUAL FEATURES AND ELEMENTS OF WHAT IS
09:32AM 23 CISCO CLI TO SEE IF IT'S USED BY THE OTHER VENDORS.

09:32AM 24 BUT AT THE END OF THE DAY, HIS OPINION IS THAT BECAUSE OF
09:32AM 25 THE EVIDENCE HE FOUND ABOUT ELEMENTS AND FEATURES, HE CAN THEN

09:33AM 1 SAY WITH CONFIDENCE THAT THE ENTIRE CISCO CLI IS THE INDUSTRY
09:33AM 2 STANDARD. IS THAT FAIR?
09:33AM 3 MR. FERRALL: I DON'T THINK THAT'S RIGHT.
09:33AM 4 THE COURT: OKAY. SO HELP ME OUT.
09:33AM 5 MR. FERRALL: WHETHER CISCO CLI HAS BOUNDARIES FOR
09:33AM 6 PURPOSES OF DEFINING INFRINGEMENT, I THINK REMAINS TO BE SEEN.
09:33AM 7 I THINK THAT MERITS FURTHER DISCUSSION. BUT DOESN'T HAVE TO BE
09:33AM 8 IN THE CONTEXT OF THIS MOTION.
09:33AM 9 THE COURT: WELL, I DON'T KNOW THAT CISCO CLI IS A
09:33AM 10 THING. BUT THAT'S MY CONCERN THAT -- OR I GUESS MAYBE I SHOULD
09:33AM 11 SAY THAT I'M AFRAID THAT WHEN THE AUTHOR IS REVEALED, IT'S
09:33AM 12 GOING TO BE SOMEONE WITH A JD AFTER HIS NAME AND NOT A PHD.
09:33AM 13 MR. FERRALL: RIGHT.
09:33AM 14 BUT WHAT DR. BLACK DID, AND WHAT THEN MR. SEIFERT ALSO
09:33AM 15 RELIED UPON WAS FOCUSED ON THE ELEMENTS THAT ARE ASSERTED IN
09:33AM 16 THE CASE
09:33AM 17 THE COURT: SO THAT'S WHERE I'M CONCERNED THAT THEN
09:33AM 18 ALL HIS OPINION IS, IS THAT A PARTICULAR ELEMENT HAS BECOME A
09:34AM 19 DE FACTO STANDARD. AND FOR HIM THEN TO TAKE A NUMBER OF
09:34AM 20 ELEMENTS, I WON'T CATEGORIZE THEM AS FEW OR MANY, BUT A NUMBER
09:34AM 21 OF ELEMENTS THAT ARE LESS THAN THE WHOLE AND EXTRAPOLATE THAT
09:34AM 22 ON TO THE WHOLE IS A CONCERN OF MINE. THAT'S A METHODOLOGY
09:34AM 23 CONCERN THAT I HAVE.
09:34AM 24 MR. FERRALL: WELL, I GUESS THE RELEVANT ISSUE FOR
09:34AM 25 THE CASE, AND I WILL TALK ABOUT RELEVANCE, BUT THE RELEVANT

09:34AM 1 ISSUE FOR THE CASE IS WHETHER THE ASSERTED ELEMENTS OF THE
09:34AM 2 CISCO CLI HAVE, IN EFFECT, BECOME A DE FACTO STANDARD.
09:34AM 3 NOW WHEN CISCO TALKS ABOUT THEIR CLI BECOMING A DE FACTO
09:34AM 4 STANDARD, OF COURSE THEY ARE NOT ITEMIZING 500 COMMANDS AND 11
09:34AM 5 PROMPTS AND BLAH, BLAH, RIGHT. THEY ARE JUST SAYING IT. AND
09:34AM 6 THAT'S THE WAY DELL SAYS IT AND THAT'S THE WAY HP SAYS IT AND
09:34AM 7 SO FORTH. THEY ARE NOT ITEMIZING.
09:34AM 8 BUT HE'S DONE THE HOMEWORK, DR. BLACK THAT IS, AND LOOKED
09:34AM 9 AT IT ON A DETAILED BASIS, BECAUSE WHAT'S AT ISSUE IN THIS CASE
09:35AM 10 IS WHETHER THE ASSERTED ELEMENTS ARE STANDARDIZED, IN EFFECT,
09:35AM 11 DE FACTO STANDARDIZED, AND HE PRESENTS HIS EVIDENCE.
09:35AM 12 AND SURE, CISCO CAN CROSS-EXAMINE HIM AND SAY, LOOK, THESE
09:35AM 13 COMMANDS, THERE ARE ONLY THREE VENDORS THAT USE THEM, AND HE
09:35AM 14 WILL EXPLAIN WHY MAYBE FEWER VENDORS USE CERTAIN COMMANDS
09:35AM 15 BECAUSE THOSE FEATURES AREN'T IN PLAY, WHATEVER, THAT'S ALL FOR
09:35AM 16 CROSS-EXAMINATION.
09:35AM 17 THE COURT: SURE.
09:35AM 18 MR. FERRALL: BUT HE DID THE HARD WORK SPANNING
09:35AM 19 HUNDREDS OF PAGES OF EXHIBITS, AND GOD KNOWS HOW MANY HOURS OF
09:35AM 20 TIME LOOKING AT THOUSANDS AND THOUSANDS OF PAGES OF MANUALS AND
09:35AM 21 EXTRACTING THE COMMANDS AND TRYING TO SEE THIS USAGE, ALL TO
09:35AM 22 EXPLAIN WHAT IS IMPORTANT EVIDENCE IN THE CASE. AND THAT IS
09:35AM 23 THAT CISCO AND MULTIPLE OTHER VENDORS REFER TO THIS AS A DE
09:35AM 24 FACTO STANDARD.
09:35AM 25 SO THE JURY, I THINK IT'S IMPORTANT THAT THE JURY

09:35AM 1 UNDERSTAND --

09:36AM 2 THE COURT: SO HOW DO I SEPARATE AN EXPERT'S OPINION

09:36AM 3 FROM A COMPANY'S PUFFING ABOUT ITS PRODUCT?

09:36AM 4 YOU KNOW -- AND IT'S NOT THAT I WOULD EXCLUDE THE EVIDENCE

09:36AM 5 OF WHAT CISCO SAYS ABOUT ITS OWN PRODUCT, I'M NOT SAYING THAT,

09:36AM 6 BUT IT REALLY KIND OF BEGS THE QUESTION, AND YOU KNOW,

09:36AM 7 GENERALLY, I'M JUST UNCOMFORTABLE WITH THOSE STATEMENTS BEING

09:36AM 8 USED, PERHAPS AS A VERY TANGENTIAL BOLSTERING OF THE ULTIMATE

09:36AM 9 OPINIONS THAT GLEANED FROM THE HARD WORK THAT YOU POINT OUT.

09:36AM 10 MR. FERRALL: WELL, HERE'S THE THING, ACTUALLY, IF WE

09:36AM 11 COULD JUST, WHILE WE ARE TALKING ABOUT THIS, PULL UP THE

09:36AM 12 SEIFERT SLIDE 22.

09:36AM 13 THE COURT: YOU WANT ME TO LOOK AT SEIFERT OR BLACK.

09:37AM 14 MR. FERRALL: SEIFERT.

09:37AM 15 MR. VAN NEST: IT'S ON THE SCREEN TOO, YOUR HONOR.

09:37AM 16 THE COURT: IT'S EASIER IF I CAN LOOK AT THE PAPER

09:37AM 17 AND LOOK AT YOU.

09:37AM 18 MR. FERRALL: SO YOU MENTIONED IEEE DEFINITION. WE

09:37AM 19 INCLUDED THE DE FACTO STANDARD MR. SEIFERT USED IN HIS REPORT

09:37AM 20 AS COMPARED TO THE IEEE DEFINITION. IT IS A DEFINITION, IT'S

09:37AM 21 IN THE IEEE GLOSSARY, AND IT DOESN'T HAVE TO DO WITH

09:37AM 22 INTEROPERABILITY AT ALL, THAT'S NOT THE POINT OF THIS. THE

09:37AM 23 POINT IS IT IS A LITTLE CLOUDY AROUND THE EDGES. NOBODY CAN

09:37AM 24 SAY THAT SOMETHING THAT COMES INTO COMMON USAGE AND IS USED HAS

09:37AM 25 A BRIGHT LINE.

09:37AM 1 THE COURT: SO RELEVANCE IS ONE OF THE ISSUES RAISED.

09:37AM 2 SO OKAY, IT WAS HELPFUL TO ME WHEN I BECAME AWARE THROUGH

09:37AM 3 YOUR PAPERS THAT I IEEE GIVES US A DEFINITION, SO YOU DIDN'T

09:37AM 4 MAKE IT UP, SO THIS IS WELL RESPECTED, THIS IS THE ENTITY ONE

09:38AM 5 WOULD LOOK TO.

09:38AM 6 BUT THEN I GET BACK TO THE QUESTION OF HOW IS THIS

09:38AM 7 DEFINITION USED, WHAT DOES THIS MEAN?

09:38AM 8 YOU WANT TO SUGGEST TO THE JURY THAT IT'S OKAY FOR ARISTA

09:38AM 9 TO USE THESE FEATURES AND ELEMENTS BECAUSE THEY HAVE BECOME A

09:38AM 10 DE FACTO STANDARD. THAT AGAIN BEGS THE QUESTION OF, IS IT

09:38AM 11 FREE?

09:38AM 12 AND SO I'M VERY CONCERNED ABOUT THAT UNDERLYING IMPLICATION

09:38AM 13 OF WHAT A STANDARD IS. AND OF COURSE THE JURY CAN BE EXPRESSLY

09:38AM 14 INSTRUCTED THAT STANDARDS ARE NOT THEN AVAILABLE TO COMPETITORS

09:38AM 15 FOR NO PAYMENT. I CAN CERTAINLY INSTRUCT THEM ON THAT, BUT I

09:38AM 16 STILL HAVE SOME CONCERNS ABOUT THE IMPLICATIONS.

09:38AM 17 MR. FERRALL: WELL, YOUR HONOR, FAIR USE CONSIDERS

09:38AM 18 WHETHER THE COPYRIGHT HOLDER WOULD HAVE CONSIDERED THE USE FAIR

09:38AM 19 AT THE TIME IN LIGHT OF WHAT WAS GOING ON IN THE -- THE WALL

09:39AM 20 DATA CASE, WE CITE THAT, AND I THINK THE QUOTE FROM THAT, IF I

09:39AM 21 HAVE IT RIGHT, IS THAT THE CUSTOM AT THE TIME WOULD HAVE

09:39AM 22 DEFINED THE USE AS REASONABLE.

09:39AM 23 AND THE PURPOSE OF THIS TESTIMONY AND ALL OF THE EVIDENCE

09:39AM 24 THAT DR. BLACK GIVES, THE BACKGROUND EXPLANATION OF HOW

09:39AM 25 TECHNOLOGIES BECOME DE FACTO STANDARDS THAT MR. SEIFERT GIVES,

09:39AM 1 IS TO EXPLAIN TO THE JURY HOW IN THIS FIELD, AT THIS TIME IN
09:39AM 2 THE LATE 2000'S, WHEN ARISTA STARTED DEVELOPING ITS CLI, HOW IT
09:39AM 3 WAS FAIR, EVEN IN CISCO'S MIND, FOR OTHER VENDORS TO USE THESE
09:39AM 4 WORDS, THESE SHORT PHRASES, ET CETERA.

09:39AM 5 AND THAT'S WHAT IT GOES TO, YOUR HONOR. IT'S A FUNDAMENTAL
09:39AM 6 DEFENSE. IT'S NOT AT ALL THE CASE, AS YOU'VE SAID, AND WE HAVE
09:39AM 7 SAID IN OUR PAPERS, IT'S NOT AT ALL THE CASE THAT WE ARE GOING
09:39AM 8 TO SAY IT'S A DE FACTO STANDARD, THEREFORE IT'S NOT
09:40AM 9 COPYRIGHTABLE. THAT'S NOT THE DEFENSE.

09:40AM 10 BUT IT'S VERY CLEAR THAT THE JURY IS ENTITLED TO AND NEEDS
09:40AM 11 TO UNDERSTAND WHAT THE STATE OF THE MARKET OF THESE VENDORS
09:40AM 12 WERE AT THE TIME AND WHAT WAS EXPECTED TO BE, WHAT WAS EXPECTED
09:40AM 13 TO BE FAIR USE AND NOT.

09:40AM 14 THE COURT: WELL, YOU KNOW, I CERTAINLY THINK IT'S
09:40AM 15 RELEVANT TO FAIR USE.

09:40AM 16 I DON'T THINK -- YOU LIMITED THE RELEVANCE, I APPRECIATE
09:40AM 17 WHAT YOU SAID IN YOUR BRIEFING ABOUT IT, I CAN INSTRUCT A JURY
09:40AM 18 ON HOW THEY ARE TO CONSIDER IT FOR A LIMITED PURPOSE ONLY. AND
09:40AM 19 THEN THE QUESTION IS, IS IT LEGITIMATE OPINION TESTIMONY, DOES
09:40AM 20 IT HAVE A PROPER METHODOLOGY BEHIND IT.

09:40AM 21 MR. FERRALL: RIGHT.

09:40AM 22 THE COURT: AND SO I STILL GET BACK TO MY FUZZINESS
09:40AM 23 ABOUT WHERE'S THE LINE, WHAT'S THE DEMARCACTION BETWEEN -- WHEN
09:40AM 24 DOES SOMETHING CROSSOVER TO BE A DE FACTO STANDARD?

09:41AM 25 MR. FERRALL: BUT I THINK THAT'S -- YOUR HONOR, I

09:41AM 1 THINK THAT'S SOMETHING FOR THE JURY TO DELIBERATE ON.

09:41AM 2 IF WE CAN GO TO THE NEXT SLIDE, FOR EXAMPLE. AND SO THIS

09:41AM 3 IS, I JUST -- BECAUSE I HAVE THE RESPONSIBILITY FOR

09:41AM 4 MR. SEIFERT, I SELECTED HIS EXHIBITS. DR. BLACK ATTACHED MUCH

09:41AM 5 MORE.

09:41AM 6 THE COURT: OKAY. SURE.

09:41AM 7 MR. FERRALL: BUT MR. SEIFERT REFERRED TO JUST A

09:41AM 8 COUPLE EXHIBITS, AND THIS WAS I THINK EXHIBIT, I GUESS HIS

09:41AM 9 REPORT EXHIBIT C, WHERE HE OBSERVES THE COMMONALITY OF THE

09:41AM 10 MODES AND THE PROMPTS ACROSS VENDORS.

09:41AM 11 SO I'VE ATTACHED JUST TWO PAGES OF ABOUT A 10 PAGE OR 12

09:41AM 12 PAGE EXHIBIT. AND YOU HAVE THE CISCO ASSERTED MODE ON THE LEFT

09:41AM 13 AND PROMPT, AND THEN HE RUNS FOR, I DON'T KNOW HOW MANY

09:41AM 14 VENDORS, BUT MULTIPLE DOZENS OF VENDORS, HE NOTES WHAT MODES

09:42AM 15 WERE AVAILABLE FROM THESE VENDORS.

09:42AM 16 AND THE FIRST PAGE HERE WE'VE GOT ALCATEL AND LUCENT, BUT

09:42AM 17 GO TO THE NEXT PAGE WHICH IS THE -- SO HERE WE HAVE VENDORS AS

09:42AM 18 PROMINENT AS NORTEL, AVAYA, FOUNDRY, BROCADE, DELL, FORCE10.

09:42AM 19 THESE ARE PEOPLE WHO CISCO IDENTIFIED IN DEPOSITION AS SOME OF

09:42AM 20 THEIR PRIMARY COMPETITORS IN VARIOUS SUBMARKETS. YOU SEE

09:42AM 21 ALMOST IDENTICAL MODES ACROSS THE LINE.

09:42AM 22 AND HE GOES ON. SO THE POINT IS, IF THERE'S A VENDOR WHO

09:42AM 23 DOESN'T HAVE THE SAME MODES, FINE, THE JURY CAN CONSIDER THAT

09:42AM 24 AND SAY WELL, MAYBE IT WASN'T SUCH A STANDARD, BUT THAT'S A

09:42AM 25 FACTUAL ISSUE FOR THE JURY TO CONSIDER.

09:42AM 1 BUT WE ARE NOT, NEITHER MR. SEIFERT NOR DR. BLACK IS MAKING
09:42AM 2 UP THIS TERM "DE FACTO STANDARD" AND PULLING IT OUT OF THIN
09:43AM 3 AIR. IT'S IN THE EXISTING DOCUMENTS PRIOR TO LITIGATION BY THE
09:43AM 4 PARTIES BY THIRD PARTIES, AND IT'S AN ACCEPTED IEEE TERM
09:43AM 5
09:43AM 6 THE COURT: OKAY. BUT YOU ARE SUGGESTING THAT I
09:43AM 7 SHOULD BE THE FIRST ONE TO APPLY IT.
09:43AM 8
09:43AM 9 MR. FERRALL: WELL, I'M SUGGESTING --
09:43AM 10 THE COURT: NO JUDGE WANTS TO BE THE FIRST.
09:43AM 11 MR. FERRALL: THIS IS A CASE IN WHICH THE EVIDENCE
09:43AM 12 OVERWHELMINGLY SUPPORTS THE RELEVANCE OF THIS TERM AS ITS BEEN
09:43AM 13 USED THROUGHOUT THE INDUSTRY. 4.
09:43AM 14
09:43AM 15 SO IF THERE WERE A CASE ABOUT ETHERNET BEFORE IT WAS
09:43AM 16 STANDARDIZED BY IEEE, MAYBE SO. MAYBE IT'S AN INDICATION THAT
09:43AM 17 PEOPLE DON'T USUALLY ASSERT COPYRIGHT OVER SOMETHING THAT'S
09:43AM 18 BECOME A DE FACTO STANDARD SO IT DOESN'T COME INTO LITIGATION,
09:43AM 19 MAYBE THAT'S WHY IT HASN'T BEEN RAISED BEFORE.
09:43AM 20
09:43AM 21 THE COURT: AND WHO IS -- I'M GOING TO HEAR SOME MORE
09:43AM 22 ON DR. BLACK?
09:43AM 23
09:43AM 24 MR. WONG: YES, YOUR HONOR.
09:43AM 25 RYAN WONG FOR ARISTA NETWORKS AND MR. FARRELL DID A GOOD
09:44AM 21 JOB OF ADDRESSING YOUR HONOR'S QUESTIONS I'M JUST GOING TO PUT
09:44AM 22 A LITTLE MORE MEAT ON THE BONE.
09:44AM 23
09:44AM 24 BUT I WANTED TO ADDRESS AN ISSUE, YOUR HONOR. IT SOUNDED
09:44AM 25 LIKE CISCO'S COUNSEL CONCEDED THAT THE ONLY CHALLENGE WITH
RESPECT TO THE DE FACTO INDUSTRY STANDARD CLI THAT THEY HAVE IS

09:44AM 1 THE LABEL OF DE FACTO STANDARD AND THE UNDERLYING DATA WHICH
09:44AM 2 SPANS HUNDREDS OF PAGES AS WELL AS APPENDIXES OF DR. BLACK'S
09:44AM 3 REPORT, IS NOT THE SUBJECT OF THIS MOTION. IN FACT, THAT HAS
09:44AM 4 TO BE THE CASE BECAUSE HE NEVER ATTACHED THE APPENDIXES TO THE
09:44AM 5 ORIGINAL MOTION.

09:44AM 6 AND I NOTE, YOUR HONOR, IN TERMS OF THE ACTUAL PARAGRAPHS
09:44AM 7 OF DR. BLACK'S REPORT THEY CITE IN THEIR MOTION, ONLY FOUR OF
09:44AM 8 THEM, OPENING REPORT PHOTOGRAPHS 90 AND 171, AND REBUTTAL
09:44AM 9 REPORT PARAGRAPHS 126 AND 131, REFER TO DR. BLACK'S CONCLUSION
09:44AM 10 THAT THERE ARE DE FACTO INDUSTRY STANDARD CLI FEATURES.

09:44AM 11 THE REST OF THE PARAGRAPHS THAT THEY CITE WHICH IS
09:44AM 12 APPROXIMATELY 15 PARAGRAPHS JUST GIVE GENERAL BACKGROUND ABOUT
09:45AM 13 THE IEEE AND THE --

09:45AM 14 THE COURT: YES.

09:45AM 15 MR. WONG: SO THOSE WOULD REMAIN REGARDLESS.

09:45AM 16 NOW MR. FERRALL WAS WALKING THE COURT THROUGH DR. BLACK'S
09:45AM 17 APPROACH AT HIS DE FACTO INDUSTRY STANDARD OPINION.

09:45AM 18 AND JUST LIKE MR. SEIFERT, DR. BLACK USED WHAT IS A -- THIS
09:45AM 19 IS SLIDE TWO OF DR. BLACK'S PRESENTATION. JUST LIKE
09:45AM 20 MR. SEIFERT DR. BLACK USED A DEFINITION OF DE FACTO STANDARD,
09:45AM 21 WHICH IS COMMON WITH HIS OWN UNDERSTANDING AND EXPERIENCE IN
09:45AM 22 THE INDUSTRY, AS WELL AS CONSISTENT WITH WHAT TECHNICAL
09:45AM 23 PUBLICATIONS SAY.

09:45AM 24 AND HE CITES A COUPLE OF THEM IN HIS ACTUAL REPORT. AND HE
09:45AM 25 SIMPLY APPLIED THAT TO THE INDUSTRY STANDARD CLI FEATURES THAT

09:45AM 1 HE HAD WORKED WITH PERSONALLY BEFORE THIS CASE EVEN STARTED AS
09:45AM 2 WELL AS BASED UPON HIS ANALYSIS OF, AS MR. FERRALL SAID, OVER
09:46AM 3 20 DIFFERENT NETWORKING VENDORS.

09:46AM 4 NOW MR. FERRALL NOTED THERE WAS OVERWHELMING EVIDENCE THAT
09:46AM 5 THE DISPUTED CLI FEATURES WERE USED BY ALL THE VENDORS THAT
09:46AM 6 DR. BLACK LOOKED AT, INCLUDING ALL OF CISCO'S MAJOR
09:46AM 7 COMPETITORS. AND THIS IS JUST A SUMMARY, YOUR HONOR, OF THE
09:46AM 8 FINDINGS IN DR. BLACK'S REPORT. MR. FERRALL SHOWED THE ACCUSED
09:46AM 9 MODES AND PROMPTS. WELL OVER 20 VENDORS IN ADDITION TO CISCO
09:46AM 10 AND ARISTA USED THE SAME ACCUSED MODES AND PROMPTS.

09:46AM 11 YOU CAN LOOK AT THE HIERARCHIES, THESE ARE WHAT CISCO CALLS
09:46AM 12 THESE COMMANDS THAT START WITH THE COMMON FIRST WORD, THERE ARE
09:46AM 13 11 OF THEM THAT THEY ASSERT. ALL 11 ARE USED BY AT LEAST SEVEN
09:46AM 14 OTHER VENDORS, AND THAT'S IN ADDITION TO CISCO AND ARISTA. AND
09:46AM 15 IN FACT, NINE OF THEM ARE USED BY OVER 13 OTHER VENDORS.

09:46AM 16 AND I THINK THE SHOW COMMANDS, THE CLEAR COMMANDS.

09:46AM 17 THE COURT: HOW MANY VENDORS ARE THERE, THOUGH? 13
09:46AM 18 OUT OF 1,000 WOULDN'T BE VERY IMPRESSIVE. 13 OUT OF 20 WOULD
09:47AM 19 BE.

09:47AM 20 MR. WONG: DR. BLACK TESTIFIED, AND I THINK HE'S
09:47AM 21 RIGHT THAT HE COVERED ALL THE CISCO'S MAJOR COMPETITORS AS WELL
09:47AM 22 AS SMALLER PLAYERS IN THE FIELD. WHEN HE WAS ASKED ABOUT THE
09:47AM 23 ONES HE MIGHT HAVE MISSED, DR. ALMEROOTH BASICALLY POINTS TO A
09:47AM 24 WIKIPEDIA PAGE SAYING, LOOK AT THESE OTHER VENDORS YOU DIDN'T
09:47AM 25 LOOK AT.

09:47AM 1 AND DR. BLACK AT HIS DEPOSITION SAID, I LOOKED AT THAT

09:47AM 2 WIKIPEDIA PAGE AND THERE WERE A COUPLE OF COMPANIES FROM KOREA

09:47AM 3 THAT I DIDN'T THINK WOULD BE RELEVANT TO AN ANALYSIS HERE.

09:47AM 4 SO DR. ALMEROOTH DIDN'T ACTUALLY LIST ANY MAJOR VENDORS THAT

09:47AM 5 DR. BLACK DIDN'T ANALYZE.

09:47AM 6 AND TO THE CONTRARY OF WHAT CISCO SAYS IN THEIR MOTION,

09:47AM 7 DR. BLACK DID LOOK AT THE HUAWEI CLI AS WELL AS THE JUNO CLI.

09:47AM 8 IN FACT, HE MENTIONS THEM IN HIS REPORT AND HE ACKNOWLEDGES

09:47AM 9 THAT THEY ARE DIFFERENT IN VARIOUS RESPECTS.

09:47AM 10 THE COURT: OKAY.

09:47AM 11 MR. WONG: AND I THINK THE LAST THING I WANT TO

09:47AM 12 HIGHLIGHT FOR THE COURT, YOUR HONOR, IS MR. FERRALL NOTED THAT

09:47AM 13 CISCO ITSELF, BEFORE THIS LITIGATION WAS EVEN FILED, REFERRED

09:48AM 14 TO ITS OWN CLI AS FOLLOWING A DE FACTO STANDARD.

09:48AM 15 AND THESE ARE ALL EXCERPTS FROM DR. BLACK'S REPORT. HERE

09:48AM 16 WE HAVE CISCO TALKING ABOUT IT, BUT WE ALSO HAVE DELL AND

09:48AM 17 JUNIPER, TWO MAJOR COMPETITORS OF CISCO ALL REFERRING TO THEIR

09:48AM 18 CLI'S AS INDUSTRY STANDARD CLI IN THEIR PUBLIC DOCUMENTATION.

09:48AM 19 AND YOUR HONOR, WE DEPOSED DELL AND JUNIPER AND THEY

09:48AM 20 CONFIRMED IN THEIR DEPOSITION THAT THIS INDUSTRY STANDARD CLI

09:48AM 21 THAT THEY ARE TALKING ABOUT -- AND IT'S CONFIDENTIAL SO I WON'T

09:48AM 22 GO INTO DETAILS, BUT THEY SAID IT'S THE MODES, IT'S THE

09:48AM 23 COMMANDS, IT'S EVEN THE RESPONSES.

09:48AM 24 THOSE ARE THE THINGS THAT ARE COMMON ACROSS THE INDUSTRY,

09:48AM 25 THAT'S WHAT WE MEAN WHEN WE SAY INDUSTRY STANDARD CLI.

09:48AM 1 SO WE HAD THE OPPORTUNITY TO ASK THESE COMPANIES WHAT DID
09:48AM 2 YOU MEAN WHEN YOU SAID THIS, AND IT'S THE SAME DEFINITION THAT
09:48AM 3 DR. BLACK APPLIES WHEN HE SAYS THESE FEATURES ARE STANDARD.

09:48AM 4 AND JUST THREE MORE EXAMPLES OF OTHER COMPETITORS.
09:48AM 5 WITH THAT YOUR HONOR, IF YOU HAVE ANY QUESTIONS.

09:49AM 6 THE COURT: OKAY. NO. THANK YOU.

09:49AM 7 MR. FERRALL, DID YOU WANT TO COMMENT ON MR. SEIFERT'S
09:49AM 8 OPINION ON MARKET EFFECT BEFORE WE MOVE ON TO IT? BECAUSE I'M
09:49AM 9 KEEPING AN EYE ON THE TIME AND WE ARE RUNNING BEHIND.

09:49AM 10 MR. FERRALL: RIGHT.

09:49AM 11 THE MARKET EFFECT REPORT, YOUR HONOR, I THINK YOUR HONOR'S
09:49AM 12 CONCERN WAS THAT THERE WAS NOT A MARKET SURVEY, I WOULD SUBMIT
09:49AM 13 IN THIS CASE IT'S NOT THE SORT OF QUESTION THAT'S REALLY
09:49AM 14 SUITABLE TO A MARKET SURVEY.

09:49AM 15 THE QUESTION IS, DOES HAVING COMMON CLI ELEMENTS AFFECT THE
09:49AM 16 CAUSE MARKET HARM TO CISCO, THAT'S THE --

09:49AM 17 THE COURT: SO IN THE PATENT AREA, THIS IS EXACTLY
09:49AM 18 THE STANDARD I WOULD HOLD AN EXPERT TO IS DOING A SURVEY WHEN
09:49AM 19 I'M LOOKING AT APPORTIONMENT, THE APPORTIONMENT ISSUE, SO
09:49AM 20 WHAT'S DRIVING SALES.

09:49AM 21 SO I'M -- AND MAYBE MY ANALOGY IS INCORRECT SO I WANT TO
09:50AM 22 LET YOU CORRECT MY UNDERSTANDING.

09:50AM 23 MR. FERRALL: I DON'T THINK -- I WOULD -- I DON'T
09:50AM 24 THINK THAT A MARKET SURVEY WOULD BE, I FRANKLY DON'T THINK THAT
09:50AM 25 IT WOULD BE VERY EFFECTIVE HERE. BUT EVEN IF IT COULD BE

09:50AM 1 EFFECTIVE, I DON'T THINK IT'S THE ONLY WAY TO EVALUATE WHETHER
09:50AM 2 THERE WAS MARKET HARM.

09:50AM 3 IN THIS CASE WHAT MR. SEIFERT LOOKED AT, RATHER THAN A
09:50AM 4 RESPONSE FROM A CUSTOMER WHICH MIGHT BE BASED UPON, YOU KNOW,
09:50AM 5 3, 4, 5 YEARS MEMORY, HE LOOKED AT ACTUAL DOCUMENTS, RFP'S,
09:50AM 6 THAT'S REQUEST FOR PROPOSALS, FROM CUSTOMERS. HE LOOKED AT
09:50AM 7 COMMUNICATIONS BETWEEN CUSTOMERS AND ARISTA. AND HE LOOKED AT
09:50AM 8 MARKET SHARE.

09:50AM 9 SO HE LOOKED AT OBJECTIVE PRE-EXISTING FACTS TO DETERMINE
09:51AM 10 THAT DECISIONS DO NOT APPEAR TO HAVE BEEN MADE BASED UPON THE
09:51AM 11 CLI.

09:51AM 12 AND THEN JUST LOOKING OBJECTIVELY AT THIRD PARTY DATA ABOUT
09:51AM 13 WHOSE MARKET SHARE CHANGED AND HOW MUCH DID THEY HAVE A
09:51AM 14 CISCO-LIKE CLI. HE FOUND NO RELATIONSHIP. IN FACT, HE FOUND
09:51AM 15 THAT SOME OF THE VENDORS WITH LESS OF A CISCO-LIKE CLI DID
09:51AM 16 BETTER THAN SOME THAT HAVE MORE OF A CISCO-LIKE CLI.

09:51AM 17 NOW MIGHT YOU BE ABLE TO CONSTRUCT A SURVEY THAT WOULD PASS
09:51AM 18 MUSTER, PERHAPS, BUT I THINK LOOKING AT THE OBJECTIVE
09:51AM 19 PRE-EXISTING FACTS AND DATA IS CERTAINLY A VIABLE WAY OF
09:51AM 20 OPINING ABOUT MARKET HARM, IN THIS CASE WHERE YOU ARE SPANNING
09:51AM 21 A NUMBER OF YEARS BACK AND A LOT OF DIFFERENT CUSTOMERS,
09:51AM 22 DIFFERENT MARKET SEGMENTS AND SO FORTH.

09:51AM 23 THE COURT: SO I GUESS TO ME THE PROBLEM WITH
09:52AM 24 SEIFERT'S OPINION WAS IT SEEMED ANECDOTAL.

09:52AM 25 AND I'M CONCERNED ABOUT THAT BECAUSE I DON'T KNOW WHAT

09:52AM 1 VIABILITY, I'M LOOKING AT PARAGRAPH 101, 102 OF HIS REPORT,

09:52AM 2 WHERE HE TALKS ABOUT SOME OF THE CUSTOMERS, AND I KNOW A LOT OF

09:52AM 3 THIS IS PROBABLY CONFIDENTIAL, SO I DON'T NEED TO IDENTIFY

09:52AM 4 THAT, BUT THERE IS, IN PARAGRAPH 101 THERE'S A LONG LIST OF

09:52AM 5 CUSTOMERS AND WHAT THEY HAVE DONE.

09:52AM 6 AND PARAGRAPH 102, I KNOW FROM THE EVIDENCE AVAILABLE FROM

09:52AM 7 THESE CUSTOMERS OR PROSPECTIVE CUSTOMERS, NO ONE MENTIONED A

09:52AM 8 CISCO CLI OR INDUSTRY STANDARD CLI ON THEIR LIST OF SWITCH

09:52AM 9 PRODUCT REQUIREMENTS.

09:52AM 10 SO I MEAN, THE TROUBLE I HAVE WITH THIS IS THAT IT'S A

09:52AM 11 LIMITED GROUP OF CUSTOMERS OR POTENTIAL CUSTOMERS AND A

09:52AM 12 STATEMENT, AN OPINION BASED ON THE ABSENCE, AND I GUESS THAT'S

09:53AM 13 IN THE RFQ'S OR THE RFP'S THEY PUT OUT FOR THE SWITCHES.

09:53AM 14 MR. FERRALL: AND YOUR HONOR, I WOULD SAY, WITHOUT

09:53AM 15 GETTING INTO THE DETAILS OF WHO IS NAMED HERE, BUT THESE ARE --

09:53AM 16 I THINK THE EVIDENCE WILL SHOW THAT THESE ARE, THEY MAKE UP BY

09:53AM 17 FAR THE LION'S SHARE OF ARISTA'S SALES. AND THEREFORE, TO THE

09:53AM 18 EXTENT THERE'S AN OUTLIER OR THERE'S SOME OTHER SEGMENT OF THE

09:53AM 19 MARKET OR SOME OTHER CUSTOMER, THAT SEEMS TO BE APPROPRIATE

09:53AM 20 GROUNDS FOR CROSS-EXAMINATION AND THE JURY CAN WEIGH WHETHER

09:53AM 21 THAT CUSTOMER'S DESIRE FOR A CISCO-LIKE CLI WOULD HAVE MADE A

09:53AM 22 DIFFERENCE TO THEM OR NOT. I MEAN, THAT'S GOING TO BE --

09:53AM 23 THE COURT: SO IT SEEMS LIKE YOU ARE FIGHTING ACROSS

09:53AM 24 PURPOSES WITH MR. SEIFERT TO SAY CISCO CLI IS AN INDUSTRY

09:53AM 25 STANDARD AND THEN TO SAY, ACTUALLY NOBODY WANTS THIS, SO I

09:53AM 1 DON'T KNOW WHERE THAT GOES.

09:53AM 2 MR. FERRALL: WELL, IT'S A MATTER OF MARKET HARM,

09:54AM 3 IT'S A MATTER OF --

09:54AM 4 THE COURT: IT CAN'T BE A STANDARD IF -- THAT'S THE

09:54AM 5 PROBLEM I'M HAVING WITH THAT. AND MAYBE THAT'S NOT FOR ME,

09:54AM 6 MAYBE THAT'S FOR CLOSING ARGUMENT TO THE JURY IS YOU CAN'T HAVE

09:54AM 7 IT BOTH WAYS.

09:54AM 8 MR. FERRALL: MAYBE IT IS FOR CLOSING ARGUMENT.

09:54AM 9 BUT TO BE CLEAR, THE DE FACTO STANDARD OPINIONS AS WE HAVE

09:54AM 10 JUST EXPLAINED, THEY COME FROM WHAT VENDORS USED, WHAT VENDORS

09:54AM 11 USED IN THE INDUSTRY.

09:54AM 12 WE ARE NOT BASING THAT DE FACTO STANDARD OPINION BASED UPON

09:54AM 13 A SURVEY OF CONSUMERS OBVIOUSLY OR CUSTOMERS, WE ARE BASING IT

09:54AM 14 UPON WHAT WAS REASONABLE IN THE INDUSTRY TO USE BECAUSE

09:54AM 15 EVERYONE USED IT, NO ONE COMPLAINED ABOUT IT, EVERYONE THOUGHT

09:54AM 16 THAT IT WAS FINE, CISCO SAID IT WAS A DE FACTO STANDARD AND

09:54AM 17 THAT'S HOW IT CAME ABOUT.

09:54AM 18 IT'S A LITTLE BIT DIFFERENT QUESTION TO LOOK AT, WELL, HOW

09:55AM 19 WERE PARTICULAR ARISTA SALES DRIVEN. AND SPECIFICALLY, CAN

09:55AM 20 CISCO POINT TO OR IS THERE EVIDENCE THAT THE USE OF THESE CLI

09:55AM 21 ELEMENTS CAUSED MARKET HARM, THAT'S THE RELEVANT ASSESSMENT FOR

09:55AM 22 FAIR USE.

09:55AM 23 THE COURT: BUT I GUESS I'M STILL ASKING YOU IF IT'S

09:55AM 24 AN INDUSTRY STANDARD BECAUSE IT'S BECOME SO COMMON THAT

09:55AM 25 EVERYONE WANTS TO USE IT, BUT THEN MR. SEIFERT IS GOING TO

09:55AM 1 TRANSITION TO HIS NEXT OPINION, BUT ON MARKET EFFECTS, ARISTA'S
09:55AM 2 CUSTOMERS ARE NOT BUYING SWITCHES BECAUSE OF THIS REALLY
09:55AM 3 IMPORTANT ALL ENCOMPASSING DE FACTO INDUSTRY STANDARD, IT
09:55AM 4 DOESN'T WORK. I DON'T KNOW WHAT I'M DOING THERE. I DO NOT
09:55AM 5 KNOW WHETHER THE OPINIONS GO OR IT'S -- AS I SAY, MAYBE I'VE
09:55AM 6 JUMPED INTO AN AREA I DON'T NEED TO BE IN BECAUSE THAT'S A
09:55AM 7 FACTUAL THAT THE JURY COULD SIMPLY DISREGARD.

09:55AM 8 MR. FERRALL: IT IS. AND I THINK -- I BELIEVE
09:56AM 9 THERE'S AN EXPLANATION FOR IT.

09:56AM 10 AND I'M TRYING TO GIVE IT TO YOU WHICH IS TO SAY THAT THE
09:56AM 11 MARKET HARM IS SPECIFIC TO ARISTA'S SALES THAT ARE ACCUSED IN
09:56AM 12 THIS CASE. WHAT SALE CAUSED HARM TO CISCO.

09:56AM 13 THOSE ARE, AS I'VE SAID, DRIVEN ALMOST ENTIRELY BY A SET OF
09:56AM 14 CUSTOMERS THAT ARE, MOST OF WHICH ARE ENUMERATED HERE IN
09:56AM 15 PARAGRAPH 101, WHOSE MARKET PURCHASE DECISIONS ARE DIFFERENT
09:56AM 16 THAN OTHERS. AND DIFFERENT THAN WHAT DRIVES THE DE FACTO
09:56AM 17 STANDARDIZATION FOR OTHER COMPANIES AND OTHER SUBMARKETS.

09:56AM 18 SO IT IS A FACTUAL ISSUE WHICH MAY BE OUR BURDEN TO EXPLAIN
09:56AM 19 TO THE JURY, COME TIME.

09:56AM 20 THE COURT: OKAY. ALL RIGHT.

09:56AM 21 MR. NELSON, I DON'T THINK YOU RESPONDED OR MADE ANY
09:56AM 22 COMMENTS ON MR. SEIFERT, AND I WAS JUST TRYING TO SAVE SOME
09:57AM 23 TIME SINCE MR. FERRALL HAD STARTED WITH MR. SEIFERT.

09:57AM 24 MR. NELSON: RIGHT. THANK YOU, YOUR HONOR.

09:57AM 25 SO BRIEFLY ON THE INDUSTRY STANDARD POINT, IN TERMS OF THE

09:57AM 1 UNDERLYING, YOU KNOW, IF IT THEY WANT TO TALK ABOUT COMMONALITY
09:57AM 2 AND THOSE KINDS OF THINGS, UNDERLYING DATA, I'VE ALREADY
09:57AM 3 ADDRESSED THAT POINT, BUT NOW THEY WANT TO OFFER THIS
09:57AM 4 DEFINITION THIS IEEE DEFINITION, VERY AMORPHOUS, VERY
09:57AM 5 SUBJECTIVE AND THEY NEVER PUT ANY PARAMETERS ON IT IT.

09:57AM 6 SO EVEN AS THEY GET UP HERE TO SAY WHETHER DOES THIS
09:57AM 7 HAPPEN, WHEN DOES SOMETHING BECOME, THAT'S THE PROBLEM BECAUSE
09:57AM 8 YOU HEARD FROM THEM, THEY WANT TO EQUATE THIS DEFINITION THAT
09:57AM 9 THEIR EXPERTS HAVE CREATED, EXCEPT FOR THEY HAVEN'T TOLD US
09:57AM 10 WHAT IT IS, FOR THIS LITIGATION, WITH STATEMENTS THAT ARE IN
09:57AM 11 THE DOCUMENTS.

09:57AM 12 WITNESSES CAN EXPLAIN THE DOCUMENTS, THE PEOPLE WHO CREATED
09:57AM 13 THEM FROM THIRD PARTIES CAN EXPLAIN THE DOCUMENTS, BUT TO HAVE
09:57AM 14 AN EXPERT WHO OFFERS NO OBJECTIVE CRITERIA, CAN POINT TO
09:57AM 15 NOTHING PRIOR TO THIS LITIGATION AS TO WHEN SOMETHING BECOMES
09:57AM 16 THIS DE FACTO INDUSTRY STANDARD THAT THEY ARE TALKING ABOUT AND
09:58AM 17 EQUATE THOSE WITH STATEMENTS THAT ARE IN THESE DOCUMENTS,
09:58AM 18 THAT'S WHERE THE CONFUSION COMES FROM AND THAT'S WHAT'S
09:58AM 19 IMPROPER WITH THIS TESTIMONY.

09:58AM 20 AND MR. SEIFERT, IN TERMS OF THAT, HE COMES UP WITH THIS
09:58AM 21 FOUR-FACTOR TEST THAT'S LISTED IN THE BRIEFING, AND EVERY
09:58AM 22 SINGLE ONE OF THEM, HIS RESPONSE AS TO WHEN IT HAPPENS IS MY
09:58AM 23 BUSINESS JUDGMENT, RIGHT.

09:58AM 24 NOT ONLY IS THAT TEST TRULY SUBJECTIVE UNDER THE DAUBERT
09:58AM 25 STANDARD, BUT HE SAYS EXPLICITLY THAT IT'S SUBJECTIVE.

09:58AM 1 AND THE MARKET HARM ANALYSIS THAT YOUR HONOR JUST HIT ON,

09:58AM 2 THAT COMES RIGHT DOWN TO THE CRUX OF THIS ISSUE, BECAUSE ON THE

09:58AM 3 ONE HAND WHAT THEY WANT TO SAY WITH THE INDUSTRY STANDARD IS

09:58AM 4 BASICALLY THIS IS A BARRIER TO ENTRY. EVERYBODY USES THIS,

09:58AM 5 EVERYBODY UNDERSTANDS, BECAUSE REMEMBER THAT DEFINITION THAT I

09:58AM 6 LOOKED AT FROM DR. BLACK, REFERS EXPLICITLY TO CUSTOMERS,

09:58AM 7 RIGHT, CUSTOMERS EXPECT, THEY BECOME FAMILIAR, THAT'S THE WHOLE

09:59AM 8 IDEA, THE WHOLE TRIGGER BEHIND THIS.

09:59AM 9 BECAUSE OTHERWISE IT MAKES NO SENSE, RIGHT, JUST BECAUSE A

09:59AM 10 LOT OF PEOPLE USE IT, IF CUSTOMERS DON'T CARE ABOUT IT AT ALL,

09:59AM 11 THAT WOULDN'T BE A DEFENSE TO ANYTHING.

09:59AM 12 SO ON THE ONE HAND THEY WANT TO SAY IT'S A BARRIER TO

09:59AM 13 ENTRY, THEN ON THE OTHER HAND THEY WANT MR. SEIFERT, THIS

09:59AM 14 GENTLEMAN BASED UPON THESE DOCUMENTS, TO SAY NOBODY BASES

09:59AM 15 BUYING DECISIONS AS A RESULT OF THAT.

09:59AM 16 BUT THINK ABOUT THIS WAY, CARS, RIGHT, THEY ALL HAVE FOUR

09:59AM 17 WHEELS OR TIRES OR HOWEVER YOU WANT TO SAY, RIGHT. EVERYBODY

09:59AM 18 HAS COME TO EXPECT THAT. BUT IF YOU LOOK AND YOU LIST ON THE

09:59AM 19 MARKETING MATERIALS OR IF YOU ASK CUSTOMERS WHY THEY BOUGHT THE

09:59AM 20 CAR, I'M SURE, I MEAN, I DON'T KNOW THIS 100 PERCENT, BUT I'M

09:59AM 21 PRETTY SURE NOBODY IS GOING TO SAY BECAUSE IT HAD FOUR WHEELS.

09:59AM 22 BUT IF YOU ASK THE QUESTION THE PROPER WAY, WHICH IS, WHAT

09:59AM 23 AN EXPERT WOULD NEED TO DO IN THIS CONTEXT, WHAT YOUR HONOR

09:59AM 24 JUST HIT ON WHICH IS, LET'S SAY YOUR CAR DIDN'T HAVE FOUR

10:00AM 25 WHEELS, IT WAS MISSING THE LEFT FRONT WHEEL; WOULD YOU BUY THAT

10:00AM 1 CAR? AND THE ANSWER IS OVERWHELMINGLY, NO, OF COURSE NOT.

10:00AM 2 SO THAT'S THE TENSION, BUT THEY DIDN'T DO THAT MARKET

10:00AM 3 ANALYSIS ON EITHER SIDE. THEY DIDN'T ASK THE CUSTOMERS, HEY,

10:00AM 4 DO YOU NEED THIS CLI, DO YOU NEED THIS USER INTERFACE, HAVE YOU

10:00AM 5 BECOME SO ACCUSTOMED TO IT SUCH THAT IF YOU DON'T HAVE IT YOU

10:00AM 6 ARE NOT GO GOING TO CONSIDER OTHER SWITCHES.

10:00AM 7 AND ON THE MARKET HARM, THEY NEVER ASK ANYBODY THE SAME

10:00AM 8 QUESTION WHICH IS WHAT THAT INTENTION IS.

10:00AM 9 SO WE HAVE AN EXPERT THAT DOESN'T WANT TO ASK THOSE

10:00AM 10 QUESTIONS BECAUSE THEY ARE COMPLETELY INTENTIONED BOTH WITH HIS

10:00AM 11 DEFINITION OF THE INDUSTRY STANDARD AND HIS MARKET HARM AND

10:00AM 12 THAT'S THE FUNDAMENTAL PROBLEM, YOUR HONOR.

10:00AM 13 THE COURT: OKAY. ALL RIGHT.

10:00AM 14 ARE WE READY TO MOVE ON? WHAT WOULD YOU LIKE TO MOVE ON TO

10:00AM 15 NEXT?

10:00AM 16 MR. PAK: YOUR HONOR, I WILL DEFER TO MR. FERRALL.

10:00AM 17 MR. FERRALL: THANK YOU. I THINK IT'S A GOOD CHOICE.

10:00AM 18 AND SO I WOULD LIKE TO TALK ABOUT DR. ALMEROOTH AND THE SOURCE

10:00AM 19 CODE.

10:00AM 20 THE COURT: OKAY. LET'S BEAT UP ON THE CISCO GROUP.

10:01AM 21 MR. FERRALL: THANK YOU. IT'S ABOUT TIME.

10:01AM 22 THE COURT: OKAY. AND MR. FERRALL, AS I MENTIONED TO

10:01AM 23 YOU AND MAYBE THIS IS FOR CISCO TO HELP ME OUT, I ACTUALLY

10:01AM 24 DIDN'T KNOW WHAT I WAS LOOKING AT ON SOME OF THESE COPYING

10:01AM 25 DOCUMENTS.

10:01AM 1 AND YOU KNOW, I LEARN ABOUT THE CASE THROUGH THESE EARLY
10:01AM 2 MOTIONS, AND BY THE TIME I GIVE IT TO THE JURY MAYBE I WILL
10:01AM 3 KNOW AS MUCH AS THEY DO, BUT I HAVE TO MAKE SOME IMPORTANT
10:01AM 4 DECISIONS NOW, AND THESE ARE, THESE WERE VERY DIFFICULT FOR ME
10:01AM 5 TO UNDERSTAND, SO DON'T HESITATE TO HELP ME OUT.

10:01AM 6 MR. FERRALL: OKAY. I HOPE YOUR HONOR WILL FORGIVE
10:02AM 7 ME. I'M NOT GOING TO TRY TO MAKE SENSE OF THOSE.

10:02AM 8 THE COURT: IF I DON'T NEED TO MAKE SENSE OF THEM,
10:02AM 9 THAT'S MUSIC TO MY EARS.

10:02AM 10 MR. FERRALL: I DON'T THINK YOU DO, AT LEAST FOR THIS
10:02AM 11 MOTION BECAUSE, YOUR HONOR, NONE OF THOSE COPYING DOCUMENTS
10:02AM 12 RELATE TO UPON THE SOURCE CODE COPYING OPINION THAT I WANT TO
10:02AM 13 TALK ABOUT RIGHT NOW. AND I WILL GET TO WHERE THERE MAY BE A
10:02AM 14 LITTLE BIT OF OVERLAP.

10:02AM 15 THE COURT: LIKE SO MANY CIRCUMSTANCES IN THIS CASE,
10:02AM 16 I FEEL LIKE YOU TWO ARE LITIGATING TWO DIFFERENT CASES HERE,
10:02AM 17 AND MAYBE THAT'S WHAT YOU ARE DOING, I DON'T KNOW.

10:02AM 18 MR. FERRALL: I HOPE NOT.

10:02AM 19 THE COURT: SO I CAN'T DISTINGUISH BETWEEN THE -- YOU
10:02AM 20 HAVE YOUR FIRST TWO ISSUES WHICH WERE COPYING OF THE SOURCE
10:02AM 21 CODE ON THE PARSER, SOURCE CODE AND HELP DESCRIPTIONS, HELP
10:02AM 22 DESK, THEY ARE THE SAME THING, CORRECT?

10:02AM 23 MR. FERRALL: NO, THOSE ARE TWO DIFFERENT OPINIONS.

10:02AM 24 THE COURT: YOUR MOTION IS ABOUT HELP DESCRIPTIONS.
10:03AM 25 IN YOUR REPLY BRIEF YOU MAKE THE DISTINCTION BETWEEN HELP

10:03AM 1 DESCRIPTION AND HELP DESK, AND I GOT LOST THERE.

10:03AM 2 MR. FERRALL: HELP DESK IS JUST SHORTHAND FOR HELP

10:03AM 3 DESCRIPTIONS.

10:03AM 4 THE COURT: OKAY. THAT'S WHAT I SAID, THEY ARE THE

10:03AM 5 SAME THING.

10:03AM 6 MR. FERRALL: YES, YES.

10:03AM 7 BUT THE PARSER OPINION IS DIFFERENT FROM HELP DESCRIPTIONS.

10:03AM 8 THE COURT: I'M SORRY. YES.

10:03AM 9 I THOUGHT IN YOUR REPLY BRIEF YOU WERE DRAWING A

10:03AM 10 DISTINCTION BETWEEN HELP DESK AND HELP DESCRIPTIONS, WHICH IN

10:03AM 11 FACT YOU DIDN'T BRIEF IN YOUR OPENING, AND I DIDN'T THINK THEY

10:03AM 12 WERE DIFFERENT.

10:03AM 13 MR. FERRALL: NO, THEY ARE NOT.

10:03AM 14 THE COURT: THEN WE ARE ON THE SAME PAGE.

10:03AM 15 MR. FERRALL: MY APOLOGIES IF THAT WAS CONFUSING.

10:03AM 16 I WANT TO SPEND MOST OF THE TIME TALKING ABOUT THE PARSER

10:03AM 17 OPINION BECAUSE I THINK CISCO HAS MADE A CONCESSION REGARDING

10:03AM 18 THE HELP DESCRIPTION PART OF THIS MOTION THAT MORE OR LESS

10:03AM 19 RESOLVES IT.

10:03AM 20 THE COURT: OKAY.

10:03AM 21 MR. FERRALL: HERE'S THE ISSUE WITH THE PARSER.

10:03AM 22 THIS IS LITIGATING TWO DIFFERENT CASES, YOUR HONOR IS RIGHT

10:03AM 23 TO THAT EFFECT BECAUSE THIS PARSER OPINION IS COMPLETELY

10:03AM 24 ORTHOGONAL TO EVERYTHING WE HAVE BEEN TALKING ABOUT IN THE

10:04AM 25 CASE.

10:04AM 1 THIS IS AN OPINION, IT'S NOT EVEN IN DR. ALMEROOTH'S REPORT,

10:04AM 2 NOWHERE IN HIS REPORT CAN YOU FIND A STATEMENT WHERE HE

10:04AM 3 CONCLUDES THAT THERE WAS COPYING OF SOURCE CODE BY ARISTA. YOU

10:04AM 4 CAN'T FIND THOSE WORDS. IT APPEARS, AND WE COULD GO TO THE

10:04AM 5 FIRST SLIDE HERE, IT APPEARS, IT SURFACED IN HIS DEPOSITION.

10:04AM 6 SO BY WAY OF BACKGROUND, IN HIS REPORT, HE INCLUDES A FEW

10:04AM 7 SORT OF AMBIGUOUS PARAGRAPHS, THE MOST NOTORIOUS ONE BEING

10:04AM 8 PARAGRAPH 83, WHERE HE REFERS TO CERTAIN BEHAVIOR OF THE ARISTA

10:04AM 9 PARSER, AND THEN HE SAYS, IN MY OPINION, THIS IS NONSTANDARD

10:04AM 10 BEHAVIOR AND IT IS PRESENT IN BOTH CISCO AND ARISTA PROGRAMS.

10:05AM 11 HE DOESN'T SAY WHERE IT'S PRESENT IN CISCO'S PROGRAMS, HE

10:05AM 12 DOESN'T CITE ANY FILES, HE DOESN'T COMPARE ANY SOURCE CODE, HE

10:05AM 13 DOESN'T SAY THAT THIS LEAD HIM TO A BELIEF THAT THERE WAS

10:05AM 14 COPYING OF SOURCE CODE.

10:05AM 15 BUT IN HIS DEPOSITION, WE ASKED HIM, WHAT'S THE

10:05AM 16 SIGNIFICANCE OF YOUR FINDING THIS PARSER BEHAVIOR NONSTANDARD?

10:05AM 17 BECAUSE AFTER ALL, YOUR HONOR IS FAMILIAR ENOUGH NOW WITH ALL

10:05AM 18 OF THE ACCUSATIONS AND THE ELEMENTS OF THE CLI, THERE'S NOTHING

10:05AM 19 ABOUT PARSER BEHAVIOR AMONG ANY IDENTIFIED COPYRIGHT SIMILARITY

10:05AM 20 THAT WE ARE HERE TO TRY. SO WHAT IS THIS ALL ABOUT, WHY DID

10:05AM 21 YOU IDENTIFY THIS?

10:05AM 22 AND THEN IN DEPOSITION HE SAYS FOR THE FIRST TIME, AND THIS

10:05AM 23 IS AN EXCERPT, HE SAYS, "WELL, IT INDICATES THAT I BELIEVE

10:05AM 24 THERE WAS SOURCE CODE COPYING."

10:05AM 25 AND THIS IS THE FOLLOW-UP QUESTION:

10:05AM 1 "QUESTION: SO WHAT YOU ARE TRYING TO SUGGEST HERE IS THAT
10:05AM 2 YOU THINK ARISTA WOULD HAVE COPIED CISCO'S PARSER SOURCE CODE?
10:06AM 3 "ANSWER: I THINK THAT'S THE OPINION I'M EXPRESSING."
10:06AM 4 NOW TO BE CLEAR, YOUR HONOR, LET ME BE UNEQUIVOCAL. ARISTA
10:06AM 5 CATEGORICALLY REJECTS THE NOTION THAT THERE WAS ANY COPYING OR
10:06AM 6 ANY INSINUATION EVEN OF COPYING OF SOURCE CODE.
10:06AM 7 IT DID NOT, IT NEVER HAPPENED, ARISTA WILL PROVE IT IF
10:06AM 8 NECESSARY, BUT TO BE FORCED TO PROVE THAT AT A TRIAL, THAT
10:06AM 9 DOESN'T PUT AT ISSUE COPYRIGHT INFRINGEMENT OF SOURCE CODE
10:06AM 10 BECAUSE IT'S NEVER BEEN DISCLOSED IN THIS CASE BEFORE.
10:06AM 11 THE COURT: WELL, IS THAT THEN A RULE 26 PROBLEM THAT
10:06AM 12 WE HAVE INSTEAD OF A DAUBERT?
10:06AM 13 MR. FERRALL: IT CAN BE, IT CAN ACTUALLY BE REJECTED
10:06AM 14 UNDER RULE 26 AND RULE 37 BECAUSE THIS THEORY WAS NEVER
10:06AM 15 DISCLOSED IN THE CASE AS A BASIS FOR INFRINGEMENT.
10:06AM 16 THE FACT THAT IT AROSE ONLY --
10:06AM 17 THE COURT: BECAUSE THAT MAY BE REALLY THE SHORT CUT
10:06AM 18 HERE AS OPPOSED TO A COMPLICATED DAUBERT ANALYSIS. IF THAT
10:07AM 19 WASN'T IDENTIFIED IN THE CONTENTIONS, THEN MAYBE WE ARE JUST
10:07AM 20 DONE.
10:07AM 21 I'M VERY CONCERNED THAT, I MEAN, IF I HAVE TO GO THROUGH
10:07AM 22 THE REPORT AND COMPARE IT TO THE DEPOSITION AND DETERMINE
10:07AM 23 WHETHER A NEW OPINION CAME UP IN THE DEPOSITION WHICH I
10:07AM 24 WOULDN'T ALLOW, I NEED TO -- BUT I DON'T WANT TO HAVE TO
10:07AM 25 REVISIT THIS AFTER GOING THROUGH THIS ANALYSIS ONLY TO HAVE TO

10:07AM 1 COME BACK AND HAVE YOU BRING AN IN LIMINE MOTION UNDER RULE 26.

10:07AM 2 IT'S JUST AN UTTER WASTE OF MY TIME.

10:07AM 3 MR. FERRALL: FAIR ENOUGH. AGREED. AGREED.

10:07AM 4 I CAN ABSOLUTELY REPRESENT, AND I DON'T THINK THERE IS ANY

10:07AM 5 CONTENTION TO THE CONTRARY THAT THERE WAS NO THEORY DISCLOSED

10:07AM 6 IN DISCOVERY ABOUT PARSER CODE COPYING, THERE WAS NO THEORY

10:07AM 7 DISCLOSED IN DISCOVERY ABOUT THIS PARSER BEHAVIOR BEING

10:07AM 8 PROTECTED BY COPYRIGHT. AFTER ALL, IT SOUNDS FROM THE

10:08AM 9 DESCRIPTION THAT IT'S A FUNCTIONAL FEATURE THAT WOULDN'T BE

10:08AM 10 PROTECTED BY COPYRIGHT ANYWAY.

10:08AM 11 THE COURT: THAT'S A DIFFERENT ISSUE.

10:08AM 12 MR. FERRALL: UNDERSTOOD. I'M JUST SAYING IT WAS

10:08AM 13 NEVER IN THIS CASE.

10:08AM 14 THE COURT: WHAT I NEED FROM YOU IS THAT RULE 26

10:08AM 15 ISSUE PRESENTED TO ME NOW SO THAT I CAN -- BECAUSE THAT'S A

10:08AM 16 MUCH MORE STRAIGHTFORWARD ANALYSIS FOR ME.

10:08AM 17 MR. FERRALL: RIGHT.

10:08AM 18 THE COURT: AND IF I CAN -- IF I DISAGREE WITH YOU,

10:08AM 19 OF COURSE, THEN I WOULD HAVE TO COME BACK AND DO THIS. BUT I

10:08AM 20 JUST DON'T WANT TO HAVE YOU LOSE ON THIS AND HAVE YOU GO INTO

10:08AM 21 THE OTHER.

10:08AM 22 MR. FERRALL: UNDERSTOOD, YOUR HONOR.

10:08AM 23 AND I TELL YOU, WE DEBATED WHETHER TO BRING THIS UNDER RULE

10:08AM 24 26, BUT WE THOUGHT, THIS IS DAUBERT, THERE'S MOTIONS IN LIMINE

10:08AM 25 LATER, I WANTED TO KEEP IT PURE ON RULE 702.

10:08AM 1 THE COURT: AND I APPRECIATE THAT, AND I THINK ON
10:08AM 2 THIS ONE ISSUE I MAY ASK EACH OF YOU TO GIVE ME A THREE-PAGE
10:08AM 3 BRIEF ON THE RULE 26 ISSUE. BECAUSE I WOULD LIKE TO BE DONE
10:08AM 4 WITH IT EARLY.

10:08AM 5 AND MR. NELSON, YOU CAN TALK ABOUT IT IN A MINUTE, BUT WE
10:08AM 6 ARE GOING TO GO ON ON THIS.

10:08AM 7 MR. NELSON: I THINK I CAN SHORTCUT IT, YOUR HONOR.

10:09AM 8 THE COURT: OKAY.

10:09AM 9 MR. NELSON: SO YEAH, THERE ISN'T, HE'S NOT GOING TO
10:09AM 10 GO BEYOND HIS REPORT, SO WE DON'T NEED TO DO YOUR HONOR WITH
10:09AM 11 MORE BRIEFING AND ALL THAT KIND OF STUFF. WE ARE NOT ALLEGING
10:09AM 12 THAT THERE WAS PARSER SOURCE CODE COPYING IN THE CASE, SO THAT
10:09AM 13 ISN'T AN ISSUE.

10:09AM 14 AND FRANKLY, THIS PARSER SIMILARITY IN HIS REPORT WHERE IT
10:09AM 15 TALKS ABOUT THE SIMILARITY AND IDENTIFIES WHAT THOSE
10:09AM 16 SIMILARITIES ARE, AGREED IS NOT RELEVANT TO THE COPYRIGHT CASE
10:09AM 17 THAT HAS TO DO WITH THE PATENT CASE AND SOME CONTENTIONS THAT
10:09AM 18 WE TOOK ONLY WHAT WE NEEDED TO TAKE WITH RESPECT TO THE
10:09AM 19 COPYING.

10:09AM 20 SO THAT'S RIGHT, IT'S NOT A COPYRIGHT ISSUE, WE ARE NOT
10:09AM 21 TALKING ABOUT SOURCE CODE COPYING.

10:09AM 22 THE COURT: DOES THAT HAVE TO DO WITH THE HELP
10:09AM 23 DESCRIPTIONS AS WELL?

10:09AM 24 MR. NELSON: WELL, I THINK THE HELP DESCRIPTIONS IS
10:09AM 25 WHAT'S RESOLVED BECAUSE THE ONLY THING WE ARE TALKING ABOUT

10:09AM 1 THERE IS THOSE DESCRIPTIONS WERE FOUND IN THE SOURCE CODE, THEY
10:09AM 2 ARE COPIED IN, BUT THAT'S ALL WE ARE TALKING ABOUT.

10:10AM 3 WE ARE NOT TALKING ABOUT THE ACTUAL, WHAT I WOULD CALL THE
10:10AM 4 LINES OF CODE THAT IMPLEMENT IT, THAT WOULD BE MORE OF AN OUT
10:10AM 5 PUT THAT SAYS HERE IS WHAT YOU PRINT ON THE SCREEN.

10:10AM 6 THE COURT: OKAY. THEN IT LOOKS LIKE YOU ARE
10:10AM 7 SUCCESSFUL HERE, AND THAT'S GOOD.

10:10AM 8 MR. FERRALL: WITH ONE CAVEAT.

10:10AM 9 THE COURT: THANK YOU, MR. NELSON.

10:10AM 10 MR. FERRALL: THANK YOU. AND I APPRECIATE THAT.

10:10AM 11 SO THE ONE THING THAT'S LEFT OF THIS IS IF THIS OPINION
10:10AM 12 THAT ACTUALLY IS IN HIS REPORT ABOUT NONSTANDARD BEHAVIOR IS
10:10AM 13 STILL POTENTIALLY BEING OFFERED, I DO WANT TO TALK ABOUT THE
10:10AM 14 DAUBERT CHALLENGE ON THAT SPECIFICALLY, EVEN IF HE'S NOW
10:10AM 15 REPRESENTED THAT THEY'RE NOT GOING TO MAKE THE LEAP TO SOURCE
10:10AM 16 CODE COPYING.

10:10AM 17 THE COURT: WELL, I DON'T KNOW WHAT THAT'S THEN
10:10AM 18 RELEVANT TO.

10:10AM 19 MR. FERRALL: I'M NOT SURE WHAT IT IS EITHER, BUT
10:10AM 20 MR. NELSON SAID IT'S RELEVANT TO THE PATENT CASE IN SOME WAY,
10:10AM 21 I'VE NEVER SEEN THAT ARGUED AS SUCH.

10:10AM 22 THE COURT: THAT'S WHAT THE 526 DEALS WITH, THAT'S
10:10AM 23 THE SUBJECT MATTER.

10:11AM 24 MR. FERRALL: SO WE COULD MAYBE -- MAYBE WE SHOULD
10:11AM 25 SUBMIT OUR THREE PAGE BRIEF ON RELEVANCE OF THAT. BUT

10:11AM 1 MEANWHILE, WHILE WE ARE HERE, I CAN TALK ABOUT WHY I DON'T
10:11AM 2 THINK THIS -- MR. ALMEROOTH SHOULD BE ABLE TO COME IN AND SAY
10:11AM 3 THIS BEHAVIOR IS NONSTANDARD.
10:11AM 4 THE COURT: SO THE WHOLE CONCEPT HERE, ULTIMATELY
10:11AM 5 THIS IS CIRCUMSTANTIAL EVIDENCE, I THOUGHT IT WAS BEING OFFERED
10:11AM 6 AS CIRCUMSTANTIAL EVIDENCE OF COPYING, I DON'T KNOW WHETHER IT
10:11AM 7 IS, IT'S BEING OFFERED AS CIRCUMSTANTIAL EVIDENCE OF
10:11AM 8 INFRINGEMENT OF THE '526; IS THAT WHERE WE ARE, MR. PAK?
10:11AM 9 MR. PAK: YEAH.
10:11AM 10 SO AS YOUR HONOR KNOWS, COPYING IS AN ELEMENT OF RULE FOR
10:11AM 11 INFRINGEMENT ON THE '526 PATENT. WE KNOW THE '526 PATENT IS
10:11AM 12 SQUARELY FOCUSED ON THE PARSER CODE AS WE HAVE COVERED IT. WE
10:11AM 13 KNOW THE PEOPLE WHO WROTE THIS CODE, YOUR HONOR, WORKED AT
10:11AM 14 CISCO AND HAD ACCESS TO OUR CODE. DR. JAFFE OPINES ON
10:11AM 15 INFRINGEMENT ISSUES UNDER YOUR HONOR'S CLAIM CONSTRUCTION, WE
10:12AM 16 WENT THROUGH THAT, THAT'S BEEN RESOLVED.
10:12AM 17 DR. ALMEROOTH HAS GONE DEEP INTO THE SOURCE CODE FOR LOTS OF
10:12AM 18 OTHER REASONS THAT DEAL WITH HELP DESCRIPTIONS AND OTHER
10:12AM 19 ASPECTS OF THE CASE. HE FOUND SIMILARITY FROM HIS OPINION,
10:12AM 20 HE'S A COMPUTER SCIENTIST, WRITTEN PARSER CODE, HE'S ANALYZED
10:12AM 21 PARSER CODE, HE'S LOOKED AT A LOT OF DIFFERENT TYPES OF
10:12AM 22 PARSING. HE FINDS SUBSTANTIAL SIMILARITY THAT GIVES CREDENCE
10:12AM 23 TO THE WILLFUL INFRINGEMENT ALLEGATIONS IN THE '526 PATENT.
10:12AM 24 THEY ARE MORE THAN HAPPY, AS -- THEY ARE MORE THAN WELCOME
10:12AM 25 TO CROSS-EXAMINE HIM AT TRIAL, AS THEY DID IN HIS DEPOSITION,

10:12AM 1 IF THE JURY FINDS THAT HIS ANALYSIS ISN'T SUFFICIENT OR
10:12AM 2 CREDIBLE, THEN THEY CAN TELL.

10:12AM 3 THE COURT: ALL RIGHT. I CERTAINLY WANT MR. FERRALL
10:12AM 4 TO BE ABLE TO CONTINUE, SO WE ARE GOING TO FOCUS THE REMAINDER
10:12AM 5 OF THIS ARGUMENT REGARDING THE PARSER TREE TO THE '526 PATENT
10:12AM 6 ISSUES IN THE CASE, NOT THE COPYRIGHT ISSUES.

10:12AM 7 MR. FERRALL: WELL, LET ME SAY, YOUR HONOR, THERE'S
10:12AM 8 NEVER BEEN ANY EXPLANATION, I MEAN, THIS IS BRAND-NEW TODAY
10:12AM 9 THAT THIS IS RELEVANT TO THE '526.

10:13AM 10 DR. ALMEROOTH IS NOT EVEN THE EXPERT.

10:13AM 11 THE COURT: IT WASN'T IN THE BRIEFS.

10:13AM 12 MR. FERRALL: IT WAS NOT IN THE BRIEFS AT ALL.

10:13AM 13 THE COURT: SO HE HAS NOT BEEN DISCLOSED AS A WITNESS
10:13AM 14 ON THE '526 ISSUES?

10:13AM 15 MR. FERRALL: NO, THERE'S NOTHING THAT TIES THIS TO
10:13AM 16 THE '526 PATENT. DR. ALMEROOTH IS NOT OFFERING AN OPINION ABOUT
10:13AM 17 THE '526 PATENT, HE DOESN'T OPINE ON INFRINGEMENT.

10:13AM 18 THE COURT: THEN THAT'S AN ISSUE FOR ANOTHER DAY.

10:13AM 19 MR. FERRALL: I WOULD LIKE TO BE ABLE TO SUBMIT -- I
10:13AM 20 WOULD LIKE TO BE ABLE TO ARGUE THAT THIS SHOULDN'T COME IN FOR
10:13AM 21 PURPOSES OF THE '526 PATENT ON GROUNDS OF DISCLOSURE AND
10:13AM 22 OTHERWISE.

10:13AM 23 THE COURT: SO I'M GOING TO HAVE YOU TWO TALK ABOUT
10:13AM 24 THAT.

10:13AM 25 MR. PAK: SURE.

10:13AM 1 THE COURT: BECAUSE IT'S NOT A DAUBERT ISSUE, PER SE,

10:13AM 2 NOW.

10:13AM 3 I THINK THAT THERE IS A CLARITY FROM CISCO AS TO THIS

10:13AM 4 SOURCE CODE COPYING ISSUE THAT IS NOW OFF THE TABLE. SO FOR

10:13AM 5 THE MOTION PRESENTED TO THE COURT, YOU HAVE BEEN SUCCESSFUL AND

10:13AM 6 WE CAN MOVE ON. THERE ARE MANY OTHER ASPECTS TO YOUR MOTION

10:13AM 7 NOW.

10:14AM 8 MR. FERRALL: RIGHT.

10:14AM 9 THE COURT: THIS IS THE ONE YOU DEVOTED MOST OF YOUR

10:14AM 10 BRIEFING TO.

10:14AM 11 MR. FERRALL: AND THIS IS THE MOST IMPORTANT ONE.

10:14AM 12 THE COURT: AND YOU WON.

10:14AM 13 MR. FERRALL: LET ME JUST POINT OUT WHY, LET'S ASSUME

10:14AM 14 THIS, THE BEHAVIORAL ASPECTS OF THE PARSER GETS THROUGH

10:14AM 15 YOUR HONOR'S ASSESSMENT OF ITS RELEVANCE AND APPLICABILITY AND

10:14AM 16 DISCLOSURE FOR THE '526.

10:14AM 17 I JUST WANT TO POINT OUT WHY THIS OPINION, EVEN TO SAY WHY

10:14AM 18 THIS IS NONSTANDARD BEHAVIOR, SHOULDN'T BE ADMITTED UNDER

10:14AM 19 RULE 702.

10:14AM 20 THE COURT: OKAY. THAT'S FINE.

10:14AM 21 AND I REALLY WONDER IF PERHAPS ALL OF THIS NEEDS TO BE THE

10:14AM 22 SUBJECT OF A DIFFERENT MOTION THAT BRINGS IN THE FOCUS OF THE

10:14AM 23 '526, BECAUSE FRANKLY I WAS FOCUSED ON COPYRIGHTABILITY AND ALL

10:14AM 24 OF THOSE ISSUES.

10:14AM 25 MR. FERRALL: SO WAS I.

10:14AM 1 THE COURT: AND I, YOU KNOW, I DON'T PROFESS TO KNOW
10:14AM 2 THESE PAPERS AS WELL AS YOU DO, SO I CAN EASILY ACKNOWLEDGE I
10:14AM 3 MISSED SOMETHING, BUT IT SOUNDS LIKE IT JUST WASN'T THERE TO BE
10:14AM 4 FOUND.

10:15AM 5 I'M NOT SURE THAT I'VE GOT ENOUGH DESCRIPTION OF HOW IT
10:15AM 6 FITS INTO THE '526 FOR YOUR ARGUMENT. I APPRECIATE THAT THE
10:15AM 7 TERM OF NONSTANDARD BEHAVIOR IS PRETTY VAGUE, BUT I DON'T KNOW
10:15AM 8 HOW -- AND THE WITNESS WAS DEPOSED, I DON'T THINK HE REALLY
10:15AM 9 IDENTIFIED WHY IT WAS AN ODDBALL, IN HIS VIEW.

10:15AM 10 MR. FERRALL: NOT AT ALL. AND THAT'S THE PROBLEM,
10:15AM 11 YOUR HONOR.

10:15AM 12 AND THAT'S WHY, I MEAN, WELL, HIS EXPLANATION OF
10:15AM 13 NONSTANDARD IS NONTYPICAL. THAT'S THE EXPLANATION.

10:15AM 14 THE COURT: BUT IT'S NOT SO DIFFERENT THAN WHEN
10:15AM 15 SOMETHING BECOMES A DE FACTO STANDARD. SO YOU BOTH ARE
10:15AM 16 WORKING --

10:15AM 17 MR. FERRALL: IT IS.

10:15AM 18 THE COURT: YES, I KNOW THAT'S YOUR VIEW, BUT TO ME
10:15AM 19 IT'S FEELING A LOT THE SAME.

10:15AM 20 MR. FERRALL: HERE'S THE DISTINCTION, YOUR HONOR.

10:15AM 21 DR. BLACK, MR. SEIFERT REVIEWED THOUSANDS AND THOUSANDS OF
10:15AM 22 MATERIAL, HAVE DATA PRESENTED TO THE COURT AND THE JURY ABOUT
10:16AM 23 THE BASIS FOR ITS OPINION.

10:16AM 24 DR. ALMEROOTH DID NOTHING FOR THIS. NOTHING. THERE IS
10:16AM 25 NOTHING DISCLOSED BEHIND THIS OPINION.

10:16AM 1 THE COURT: AND I DON'T QUESTION THAT DR. BLACK AND
10:16AM 2 MR. SEIFERT WENT THROUGH ALL OF THAT PAINSTAKING WORK TO GO
10:16AM 3 THROUGH THE DOCUMENTS. BUT IT'S A LITTLE BIT BESIDE THE POINT
10:16AM 4 BECAUSE WHEN, ULTIMATELY, THEY GIVE ME AN OPINION THAT HAS NO
10:16AM 5 BENCHMARKS IN IT THAT I CAN OBSERVE FOR METHODOLOGY, JUST THE
10:16AM 6 FACT THAT THEY WORKED HARD, I MEAN, I WORKED HARD HERE TOO BUT
10:16AM 7 I'M NOT SURE IT CAME TO ANYTHING.

10:16AM 8 SO THAT'S MY CONCERN AND THAT'S WHERE THIS NON, WHEN IS
10:16AM 9 SOMETHING NOUN STANDARD, WHAT DO I HAVE NONSTANDARD BEHAVIOR.

10:16AM 10 SO I AGREE WITH YOU, THIS MAY NOT COME IN, BUT IT'S NOT
10:16AM 11 UNLIKE THE PROBLEM I IDENTIFIED WITH DR. BLACK. SO YOU KNOW, I
10:16AM 12 NEED TO BE CONSISTENT HERE. YOU ARE RIGHT. I'M LEFT WITH
10:17AM 13 NOTHING HERE. IT'S NONSTANDARD BECAUSE DR. ALMEROOTH SAID IT
10:17AM 14 WAS.

10:17AM 15 MR. FERRALL: AND THE DIFFERENCE IS AT LEAST WITH DR.
10:17AM 16 BLACK AND MR. SEIFERT, THERE'S A BODY OF DATA AND A TEST THAT
10:17AM 17 THEY ARTICULATE THAT YOU CAN CRITIQUE. WITH MR. ALMEROOTH,
10:17AM 18 THERE IS NO TEST, THERE IS NO DATA, THERE'S NOTHING.

10:17AM 19 THE COURT: THE REASON THAT I MAY PUT THIS OFF IS
10:17AM 20 THAT I NEED TO KNOW EXACTLY WHAT IT'S GOING TO BE OFFERED FOR
10:17AM 21 IN ORDER TO EVALUATE IT.

10:17AM 22 AND IT APPEARS THAT IT'S BEING OFFERED DIFFERENTLY THAN I
10:17AM 23 HAD ASSUMED. AND WHEN CISCO IDENTIFIES THE PURPOSE FOR
10:17AM 24 UTILIZING PARAGRAPH 83 FROM THE REPORT, THEN, I MEAN, THEN YOU
10:17AM 25 HAVE A RULE 26 ISSUE AS WELL.

10:17AM 1 AND I REALLY THINK I CAN GIVE YOU A MORE COMPREHENSIVE
10:17AM 2 DECISION IF WE PUT ALL OF THIS INTO A DIFFERENT MOTION.
10:17AM 3 MR. FERRALL: THEY'RE ENOUGH.
10:18AM 4 THE COURT: SO I THINK I'M GOING TO DEFER ON THIS
10:18AM 5 NONSTANDARD BEHAVIOR ISSUE.
10:18AM 6 OKAY. SO WE ARE DONE WITH THE PARSER SOURCE CODE ISSUE.
10:18AM 7 AND YOU WERE GOING -- IS THAT CORRECT?
10:18AM 8 MR. FERRALL: WE ARE DONE.
10:18AM 9 THE COURT: THEN MOVING ON TO, AND THEN YOU SAID THAT
10:18AM 10 THERE WAS -- THAT YOU'VE WORKED OUT THE HELP DESK ISSUE.
10:18AM 11 MR. FERRALL: RIGHT.
10:18AM 12 AND I THINK MR. NELSON CONFIRMED THAT, THAT WITH REGARD TO
10:18AM 13 THE HELP DESCRIPTIONS, THAT WE WERE CONCERNED, AND THE REASON
10:18AM 14 WE BROUGHT THIS MOTION, IS THAT WE WERE CONCERNED THAT
10:18AM 15 DR. ALMEROOTH WAS GOING TO TRANSLATE AN OPINION ABOUT THESE HELP
10:18AM 16 DESCRIPTIONS WHICH ARE STRINGS OF TEXT THAT APPEAR ON THE
10:18AM 17 SCREEN INTO AN OPINION THAT THERE WAS COPYING OF SOURCE CODE.
10:19AM 18 AND WHAT I THINK MR. NELSON AND CISCO CONFIRMED IN THEIR
10:19AM 19 OPPOSITION BRIEF IS THAT NO, THEY ARE NOT MAKING A CONTENTION
10:19AM 20 THAT THERE WAS COPYING OF SOURCE CODE, IT'S JUST AN ARGUMENT
10:19AM 21 THAT THEY SAY THEY POINT TO EVIDENCE THAT THIS STRING OF TEXT
10:19AM 22 APPEARS IN THE ARISTA SOURCE CODE, BUT OF COURSE IT DOES
10:19AM 23 BECAUSE YOU HAVE TO HAVE CODE THAT SAYS PRINT THIS TEXT.
10:19AM 24 SO AS LONG AS THERE'S NOT ANY INSINUATION OF SOURCE CODE
10:19AM 25 COPYING, THEN THAT'S NOT THE SUBJECT, THEN THIS MOTION IS

10:19AM 1 RESOLVED. WE HAVE OTHER PROBLEMS, OF COURSE, BUT THAT RESOLVES
10:19AM 2 THIS MOTION.

10:19AM 3 THE OTHER THING I WANTED TO POINT OUT THAT I THINK IS
10:19AM 4 CONCEDED, HAS TO DO WITH THE LOOK AND FEEL OPINION. AND THERE
10:19AM 5 OUR MOTION, AGAIN, WASN'T TO TRY TO ELIMINATE ANY MENTION OF
10:19AM 6 LOOK AND FEEL ALL TOGETHER, BUT WE WANTED TO MAKE SURE THAT DR.
10:20AM 7 ALMEROOTH DIDN'T HAVE A LOOK AND FEEL OPINION THAT EXTENDED
10:20AM 8 BEYOND THE CLI ELEMENTS THAT WE HAVE BEEN SPENDING A
10:20AM 9 YEAR-AND-A-HALF LITIGATING.

10:20AM 10 THE COURT: OKAY.

10:20AM 11 MR. FERRALL: AND THEY HAVE CONCEDED THAT TOO IN
10:20AM 12 THEIR OPPOSITION. SO I THINK THAT TOO IS RESOLVED.

10:20AM 13 THE COURT: AND THAT'S ALL THAT YOU WERE LOOKING FOR
10:20AM 14 THERE.

10:20AM 15 MR. FERRALL: RIGHT. AND WE DID HAVE SOME OTHER
10:20AM 16 PARTS, BUT GIVEN THE TIMING AND GIVEN THE IMPORTANCE OF OTHER
10:20AM 17 ISSUES THAT WE WANT TO RAISE TODAY, I'M GOING TO SUBMIT THE
10:20AM 18 OTHER ISSUES ON THE PAPERS, UNLESS YOUR HONOR HAS QUESTIONS.

10:20AM 19 THE COURT: OKAY.

10:20AM 20 WELL, THE REMAINING ISSUES, WELL, THERE WAS THE COPYING OF
10:20AM 21 THE TECHNICAL DOCUMENTS.

10:20AM 22 MR. FERRALL: RIGHT.

10:20AM 23 THE COURT: DID YOU WANT TO --

10:20AM 24 MR. FERRALL: SURE. THE POINT THERE IS SIMPLY THAT
10:20AM 25 DR. ALMEROOTH DOESN'T OFFER ANY ACTUAL EXPERT TESTIMONY ON IT.

10:20AM 1 AND IT'S INTERESTING BECAUSE DR. ALMEROOTH THERE, HE CLAIMS
10:20AM 2 EXPERTISE IN DETECTING PLAGIARISM. HE TALKS ABOUT A PROGRAM
10:21AM 3 THAT HE'S DEVELOPED FOR DETECTING PLAGIARISM. BUT HE DIDN'T
10:21AM 4 USE THIS PROGRAM, HE DIDN'T USE THIS TOOL, HE DIDN'T USE ANY
10:21AM 5 TOOL. HE DOESN'T DO ANYTHING OTHER THAN LOOK AT SIMILARITY AND
10:21AM 6 TEXT AND CONCLUDE THAT THERE WAS COPYING. AND THAT SEEMS LIKE
10:21AM 7 THE JURY CAN DO THAT AS EASILY AS DR. ALMEROOTH.

10:21AM 8 THE COURT: WELL, YOU KNOW, THAT WAS YOUR ARGUMENT,
10:21AM 9 IT WAS REALLY A LAY COMPARISON. I AM -- IN THE CONTEXT OF A
10:21AM 10 CASE OF THIS COMPLEXITY, I THINK THAT PLACES TOO MUCH OF A
10:21AM 11 BURDEN ON A JURY.

10:21AM 12 YOU KNOW, YOU ARE GOING TO LINE THE WALLS OF THIS COURTROOM
10:21AM 13 WITH EXHIBITS OR FILL UP A LOT OF THUMB DRIVES WITH DOCUMENTS.
10:21AM 14 AND SO PUTTING -- WHEN AN EXPERT CAN COME IN AND WALK THE
10:21AM 15 JURY THROUGH IT, I THINK THAT IS -- I THINK I'M MORE WILLING TO
10:21AM 16 LET AN EXPERT DO THAT.

10:21AM 17 YOU DON'T SUGGEST THAT WHAT HE'S DOING IS INCORRECT, YOU
10:22AM 18 JUST SAY WE DON'T NEED AN EXPERT. I THINK MY DISCRETION THERE
10:22AM 19 IS PRETTY BROAD AS TO WHETHER I WILL ALLOW HIM TO DO THAT. I
10:22AM 20 WAS INCLINED TO DENY THAT PORTION AND LET HIM WALK THROUGH HIS
10:22AM 21 COMPARISON, THEN YOU CAN CROSS-EXAMINE HIM ON THAT.

10:22AM 22 THE OTHER ISSUES WERE SUMMARIZING FACTS AND THE VOUCHING.
10:22AM 23 AND ON THOSE, I AM REALLY JUST GOING TO DEFER ANY RULING
10:22AM 24 BECAUSE CISCO IS ON NOTICE, IF THEY ASK THE QUESTION IN THE
10:22AM 25 WRONG WAY, I WANT YOU TO OBJECT. I WOULD CERTAINLY SUSTAIN A

10:22AM 1 PROPER OBJECTION THERE, BUT I CAN'T -- IT'S TOO GENERAL AN
10:22AM 2 OBJECTION FOR ME TO SUSTAIN NOW.

10:22AM 3 MR. FERRALL: FAIR ENOUGH. AND I THINK BOTH PARTIES
10:22AM 4 AGREED ON THAT ISSUE ABOUT VOUCHING AND SUBJECTIVE --

10:22AM 5 THE COURT: I THINK SO.

10:22AM 6 MR. FERRALL: RIGHT.

10:22AM 7 THE COURT: OKAY. NOW, MR. PAK, IS THERE MORE THAT
10:22AM 8 YOU WANT TO ADDRESS ON THIS OR ACTUALLY HAVE WE WORKED ALL THIS
10:22AM 9 OUT?

10:22AM 10 MR. PAK: NO, I THINK WE WOULD LIKE TO MOVE ON TO THE
10:23AM 11 DAMAGES SIDE OF THE CASE, YOUR HONOR, AT THIS POINT.

10:23AM 12 THE COURT: OKAY. SO, LET'S SEE, SO I'M GOING TO
10:23AM 13 HAVE DR. CLARK ON THE PATENT AND THEN THE DAMAGES.

10:23AM 14 MR. PAK: YES. WE COULD ACTUALLY HAVE DR. CLARK'S
10:23AM 15 ISSUE INVOLVED NOW IF YOU WOULD LIKE.

10:23AM 16 THE COURT: I WAS ACTUALLY LOOKING WHETHER TO SEE IF
10:23AM 17 THIS WOULD BE A GOOD TIME TO TAKE A BREAK, BECAUSE IT'S PRETTY
10:23AM 18 DENSE STUFF.

10:23AM 19 MR. PAK: ABSOLUTELY. THANK YOU VERY MUCH.

10:23AM 20 THE COURT: OKAY. ALL RIGHT. LET'S JUST TAKE A
10:23AM 21 TEN-MINUTE BREAK AND THEN WE WILL DO THE REMAINING.

10:23AM 22 (WHEREUPON A RECESS WAS TAKEN.)

10:32AM 23 THE COURT: WHICH MOTION ARE WE GOING TO MOVE ON TO,
10:32AM 24 MR. PAK?

10:32AM 25 MR. PAK: YOUR HONOR, ACTUALLY GIVEN THE LIMITED

10:32AM 1 AMOUNT OF TIME, WE THOUGHT WE WOULD START WITH DR.
10:32AM 2 ELSTEN'S MOTION.

10:32AM 3 THE COURT: OKAY. GREAT.

10:33AM 4 MR. PAK: AND WE CAN GO OVER SOME OF THE DAMAGES

10:33AM 5 QUESTIONS THAT YOUR HONOR MENTIONED.

10:33AM 6 THE COURT: AND LET ME JUST CHANGE MY MIND SET HERE.

10:33AM 7 SO DR. ELSTEN'S OPINIONS HAVE TO DO WITH THE TEST FOR

10:33AM 8 DISGORGEMENT; IS IT LIMITED TO THAT?

10:33AM 9 MR. PAK: THE OPINIONS THAT WE ARE CHALLENGING,

10:33AM 10 YOUR HONOR, TODAY, AT LEAST THE FOCUS OF MY ARGUMENTS WILL BE

10:33AM 11 FOCUSED ON THE DISGORGEMENT ANALYSIS ISSUE.

10:33AM 12 THE COURT: OKAY. SO THAT IS ONLY A BENCH ISSUE,

10:33AM 13 ISN'T IT?

10:33AM 14 MR. PAK: IT IS NOT, YOUR HONOR.

10:33AM 15 SO IF YOUR HONOR WOULD LIKE SEPARATE BRIEFING ON THAT,

10:33AM 16 BECAUSE THIS WAS REALLY RAISED IN THE CONTEXT OF A DAUBERT, BUT

10:33AM 17 I CAN GIVE YOU NINTH CIRCUIT CASES THAT HAVE DEALT WITH

10:33AM 18 DISGORGEMENT OF PROFITS WHERE THE JURY WAS PROVIDED

10:33AM 19 INSTRUCTIONS AND THERE WAS A FINDING OF JURY VERDICT. SO THIS

10:33AM 20 IS THE THREE BOYS MUSIC CORPORATION CASE. THIS IS THE *LOVE IS*

10:33AM 21 *A WONDERFUL THING* BY MICHAEL BOLTON, WAS THE SONG AT ISSUE IN

10:34AM 22 THAT CASE. AND THERE WAS A -- I DON'T KNOW IF YOUR HONOR

10:34AM 23 REMEMBERS, BUT THE ISLEY BROTHERS HAD THEIR VERSION IN THE 70'S

10:34AM 24 AND MICHAEL BOLTON CAME IN, DID HIS RENDITION IN THE 80'S.

10:34AM 25 THE COURT: I'M WITH YOU ON THOSE.

10:34AM 1 MR. PAK: SO WHAT HAPPENED IN THAT CASE, YOUR HONOR,

10:34AM 2 WAS THE JURY WAS INSTRUCTED ON THE BURDEN SHIFTING UNDER

10:34AM 3 504 (B). THE DAMAGES EXPERT, JUST THE SAME FRAMEWORK WE ARE

10:34AM 4 LAYING OUT HERE.

10:34AM 5 THE COURT: OKAY. AND THAT WAS RAISED IN THE ARISTA

10:34AM 6 BRIEF. AND SO I WANTED TO -- SO LET'S MOVE ON.

10:34AM 7 MR. PAK: IF YOUR HONOR WANTS BRIEFING ON THAT, WE

10:34AM 8 CAN ABSOLUTELY GIVE YOU LOTS OF NINTH CIRCUIT CASES ON THAT.

10:34AM 9 THE COURT: NO, YOU HAVE GIVEN ME ENOUGH BRIEFING.

10:34AM 10 MR. PAK: ALL RIGHT.

10:34AM 11 THE COURT: SO THE FIRST THING IS GETTING THE PROPER

10:34AM 12 TEST.

10:34AM 13 MR. PAK: YES.

10:34AM 14 THE COURT: AND SO, THAT HAS TO DO WITH, SO I'M GOING

10:35AM 15 TO HAVE TO ACTUALLY DETERMINE THE LEGAL STANDARD SO THAT I CAN

10:35AM 16 EVALUATE DR. ELSTEN'S OPINION.

10:35AM 17 MR. PAK: CORRECT.

10:35AM 18 THE COURT: BECAUSE IF SHE DIDN'T APPLY -- THAT'S

10:35AM 19 WHAT YOU ARE ARGUING, ISN'T IT?

10:35AM 20 MR. PAK: THAT'S RIGHT, YOUR HONOR.

10:35AM 21 SO THERE ARE TWO ISSUES GOING ON, YOUR HONOR. AND I THINK

10:35AM 22 THERE'S AN OVERALL ISSUE WITH RESPECT TO THE FRAMEWORK OF HOW

10:35AM 23 DISGORGEMENT SHOULD BE PRESENTED TO THE JURY, AND THAT'S AN

10:35AM 24 ISSUE THAT TOUCHES UPON DOCTOR ELSTEN, BUT IT ALSO TOUCHES

10:35AM 25 ABOUT DR. CHEVALIER.

10:35AM 1 THE COURT: SURE.

10:35AM 2 MR. PAK: AND WE MADE IT VERY CLEAR OUR POSITION,

10:35AM 3 WHICH TRACKS JUDGE ALSUP'S ORDER IN THE ORACLE V. GOOGLE CASE,

10:35AM 4 TRACKS THE NINTH CIRCUIT CASE LAW FROM THREE BOYS CORPORATION,

10:35AM 5 HARPER'S ROW FROM THE SUPREME COURT, AND THAT IS IN COPYRIGHT

10:35AM 6 LAW, THE ISSUE OF DISGORGEMENT OF PROFITS, THE BURDEN RESIDES

10:35AM 7 WITH THE DEFENDANT.

10:35AM 8 THE COURT: TO APPORTION.

10:36AM 9 THE WITNESS: TO APPORTION.

10:36AM 10 THE COURT: I DON'T THINK THAT'S DISPUTED.

10:36AM 11 MR. PAK: IT'S A LITTLE BIT OF A DISPUTE IN THE

10:36AM 12 CHEVALIER MOTIONS.

10:36AM 13 THE COURT: THE ISSUE WAS CAUSAL NEXUS.

10:36AM 14 MR. PAK: THERE'S CAUSAL NEXUS --

10:36AM 15 THE COURT: AND YOU DON'T DISAGREE? YOUR REPLY BRIEF

10:36AM 16 YOU ACKNOWLEDGE.

10:36AM 17 MR. PAK: WE HAVE A CAUSAL NEXUS BURDEN, HOWEVER IN

10:36AM 18 THE CASE OF DIRECT PROFITS, SO THIS IS A VERY DIFFERENT CASE

10:36AM 19 THAN THE ORACLE V. GOOGLE CASE. DIRECT PROFITS IS A DIFFERENT

10:36AM 20 CASE THAN THE INDIRECT PROFITS AT ISSUE IN THE ORACLE V. GOOGLE

10:36AM 21 CASE.

10:36AM 22 IF YOU RECALL IN THE ORACLE V. GOOGLE, GOOGLE DOESN'T MAKE

10:36AM 23 MONEY WILL SELLING ANDROID. THEY DERIVE INDIRECT PROFITS BY

10:36AM 24 SELLING ADVERTISING, SEARCH ENGINE REVENUES AND SO FORTH.

10:36AM 25 IN THIS CASE, WE ARE TALKING ABOUT DIRECT PROFITS THAT

10:36AM 1 ARISTA MAKES BY SELLING THE EOS OPERATING SYSTEM WHICH IS
10:36AM 2 EMBODIED IN THEIR NETWORKING EQUIPMENT. SO THE PRODUCTS THAT
10:36AM 3 EMBODY THE COPYRIGHTED WORK, IS GENERATING THE REVENUE.
10:36AM 4 AND THE NINTH CIRCUIT LAW IS VERY CLEAR ON THIS, AND I
10:36AM 5 DON'T THINK THIS IS A CONTESTED POINT, THAT WE CAN DISCHARGE
10:37AM 6 OUR CAUSAL NEXUS BURDEN BY SHOWING REVENUES THAT ARE DIRECTLY
10:37AM 7 ATTRIBUTABLE TO THE PRODUCTS THAT EMBODY THE COPYRIGHT.
10:37AM 8 THE COURT: SO I LOOKED AT THE POLAR BEAR CASE, AND
10:37AM 9 FOOTNOTE 7 THAT I BELIEVE ARISTA POINTED OUT TO ME, AND IT
10:37AM 10 SEEMS TO INDICATE THAT SECTION 504 DOESN'T ACTUALLY DISTINGUISH
10:37AM 11 BETWEEN DIRECT AND INDIRECT PROFITS AND DOES REQUIRE A SHOWING
10:37AM 12 OF CAUSAL NEXUS. AND JUDGE MCCUNE IN POLAR BEAR, THEN IN
10:37AM 13 FOOTNOTE 7 SEEMS TO REJECT THE IDEA THAT NO CAUSAL NEXUS NEED
10:37AM 14 BE SHOWN BY THE PLAINTIFF.
10:37AM 15 MR. PAK: YOUR HONOR, THAT'S ALL TRUE, BUT THEN WHAT
10:37AM 16 YOU HAVE TO DO IS LOOK AT ALL THE CASE LAW IN THE NINTH CIRCUIT
10:37AM 17 THAT APPLIES POLAR BEAR, THAT APPLIES 504(B). AND WHEN IT
10:37AM 18 COMES TO DIRECT PROFITS, THE NINTH CIRCUIT CASES HAVE ALL
10:37AM 19 INDICATED THAT THE PLAINTIFF DISCHARGES THE CAUSAL NEXUS BURDEN
10:38AM 20 BY SHOWING THAT THE REVENUES GENERATED ARE REVENUES GENERATED
10:38AM 21 DIRECTLY FROM THE SALE OF THE PRODUCTS THAT EMBODY THE
10:38AM 22 COPYRIGHTED WORKS.
10:38AM 23 AND THOSE ARE ALL THE CASES WE CITED YOUR HONOR IN THE
10:38AM 24 CAUSAL NEXUS CASES
10:38AM 25 SO AS A BROAD PRINCIPLE, YES, THE CAUSAL NEXUS IS A LEGAL

10:38AM 1 BURDEN THAT IS ON THE PLAINTIFF. BUT IN DISCHARGING THAT
10:38AM 2 BURDEN, THIS IS THE BROCADE COMMUNICATIONS V. A10 NETWORKS
10:38AM 3 CASE, TO RECOVER DISGORGEMENT OF DIRECT PROFITS, A PLAINTIFF
10:38AM 4 MAY SATISFY AS A CAUSAL LINK REQUIREMENT BY SHOWING THE GROSS
10:38AM 5 REVENUES FROM THE INFRINGING PRODUCT.

10:38AM 6 THE COURT: OKAY.

10:38AM 7 MR. PAK: THAT'S THE REASON WHY ALL THIS OTHER CASE
10:38AM 8 LAW ABOUT INDIRECT PROFITS IS REALLY NOT APPLICABLE TO THIS
10:38AM 9 CASE. WE ARE ONLY SEEKING DIRECT PROFITS FROM THE SALE OF
10:38AM 10 PRODUCTS.

10:38AM 11 SO WITH THAT YOUR HONOR, LET ME FOCUS YOUR HONOR'S
10:38AM 12 ATTENTION ON THE SPECIFIC METHODOLOGY ISSUE THAT WE HAVE WITH
10:38AM 13 DR. ELSTEN IN OUR DISGORGEMENT OF PROFITS ANALYSIS.

10:38AM 14 IF YOU LOOK AT OUR PRESENTATION SLIDE 2, AND I BELIEVE
10:39AM 15 YOUR HONOR IS VERY FAMILIAR WITH THIS CASE LAW IN THE CONTEXT
10:39AM 16 OF THE FINJAN CASE THAT YOUR HONOR DEALT WITH WHERE YOU HAVE
10:39AM 17 VERY IMPORTANT CASE LAW THAT LOOKED AT THE QUESTION OF
10:39AM 18 APPORTIONMENT.

10:39AM 19 CERTAINLY IN THAT CASE IT WAS APPORTIONMENT OF PATENT
10:39AM 20 DAMAGES, BUT WE THINK THE LEGAL PRINCIPLES APPLY HERE AS WELL
10:39AM 21 FROM A METHODOLOGY STANDPOINT, WHICH IS, IS IT PERMISSIBLE FOR
10:39AM 22 AN EXPERT TO COME IN AND SIMPLY COUNT THE NUMBER OF FEATURES IN
10:39AM 23 A PRODUCT AND THEN DO A DIVISION WITH THE DENOMINATOR BEING THE
10:39AM 24 NUMBER OF FEATURES IN ORDER TO ARRIVE AT A VALUATION OPINION.

10:39AM 25 THE COURT: SO YOU DO KNOW THAT IN THE FINJAN TRIAL I

10:39AM 1 ALLOWED THAT EVIDENCE TO COME IN AND THE EXPERT DID TESTIFY
10:39AM 2 THAT OF THE 24 ELEMENTS, SHE JUST COUNTED THEM, AND THAT'S WHAT
10:39AM 3 WENT TO THE JURY.

10:39AM 4 MR. PAK: THAT'S RIGHT, YOUR HONOR.

10:39AM 5 BUT YOUR HONOR ALSO NOTED VERY IMPORTANTLY THAT THE KEY
10:39AM 6 ISSUE IS THE FOUNDATION OF FACTS QUESTION.

10:39AM 7 AND WHAT YOUR HONOR FOUND IN THAT CASE IS THERE WAS AT
10:40AM 8 LEAST A DISPUTED FACT AS TO WHETHER FOUNDATIONAL FACTS COULD BE
10:40AM 9 LAID PROPERLY AT TRIAL, AND YOUR HONOR ALLOWED THAT ISSUE TO GO
10:40AM 10 TO TRIAL.

10:40AM 11 HERE, WE HAVE A VERY DIFFERENT SITUATION. THIS IS SLIDE 4,
10:40AM 12 OF OUR PRESENTATION. WE DEPOSED DR. ELSTEN. BECAUSE SHE DOES
10:40AM 13 NO ANALYSIS WHATSOEVER INTO THE FOUNDATIONAL FACTS. AND THE
10:40AM 14 FOUNDATIONAL FACTS HERE ARE THE RELATIVE VALUATION, AND THIS IS
10:40AM 15 THE FRANK MUSIC CASE WE CITED YOUR HONOR FROM THE
10:40AM 16 NINTH CIRCUIT, QUANTITATIVE ANALYSIS ALONE ISN'T SUFFICIENT,
10:40AM 17 YOU HAVE TO LOOK AT THE QUALITATIVE ASSESSMENT OF, ARE THESE
10:40AM 18 FEATURES -- SOME OF THESE FEATURES MORE VALUABLE THAN OTHER
10:40AM 19 FEATURES?

10:40AM 20 BECAUSE I COULD HAVE A LIST OF A HUNDRED FEATURES AND I
10:40AM 21 JUST DO A DIVISION BY 100 AND IT'S NOT GOING TO SUPPORT A
10:40AM 22 FINDING OF VALUATION OF ONE PERCENT.

10:40AM 23 SO HERE WE SAW NO ANALYSIS IN HER REPORT THAT EVEN
10:40AM 24 ATTEMPTED TO DO A VALUATION OF THESE FEATURES RELATIVE TO EACH
10:40AM 25 OTHER.

10:40AM 1 AND IN FACT, WHEN SHE WAS ASKED THIS QUESTION IN HER
10:40AM 2 DEPOSITION, PAGE 213, IN DOING THOSE CALCULATIONS IN TABLE 13,
10:41AM 3 TABLE 13 SUMMARIZES ALL OF OUR EVIDENCE WITH RESPECT TO THIS
10:41AM 4 ISSUE OF THE VALUATION ON 12.5 PERCENT, WE ASKED HER, YOU HAVE
10:41AM 5 TREATED EACH OF THESE FEATURES IN THE TOTAL FEATURES
10:41AM 6 CALCULATIONS AS BEING OF EQUAL WEIGHT; IS THAT CORRECT? YES.
10:41AM 7 AND THIS IS THE KEY IMPORTANT ISSUE, YOU HAVE NOT ATTEMPTED
10:41AM 8 TO ASCERTAIN WHETHER ANY OF THESE FEATURES SHOULD BE GIVEN MORE
10:41AM 9 OR LESS WEIGHT THAN THE OTHER FEATURES; IS THAT CORRECT? NOT
10:41AM 10 FOR THE PURPOSE OF THIS CALCULATION.
10:41AM 11 THAT IS A DISPOSITIVE ADMISSION THAT THIS EXPERT SIMPLY
10:41AM 12 COUNTED THE FEATURES FOR THE PURPOSE OF ARRIVING AT
10:41AM 13 12.5 PERCENT WITHOUT EVEN LOOKING INTO THE FOUNDATIONAL FACTS.
10:41AM 14 AND WE COULD EVEN ANALOGIZE THIS CASE, YOUR HONOR, TO -- AS
10:41AM 15 YOUR HONOR KNOWS IN PATENT CASES, WE DO ENGAGE IN SURVEYS, WE
10:41AM 16 DO LOOK INTO OTHER METHODOLOGIES THAT HAVE BEEN WELL APPROVED
10:41AM 17 BY THE FEDERAL CIRCUIT AND THE NINTH CIRCUIT FOR ASCERTAINING
10:41AM 18 VALUATION, NOT SIMPLY COUNTING UP FEATURES.
10:42AM 19 THEY COULD HAVE DONE CUSTOMER SURVEYS TO UNDERSTAND WHERE
10:42AM 20 DOES CLI RANK. AND I THINK MR. NELSON PUT IT APTLY, WHICH IS,
10:42AM 21 WE DON'T KNOW THE ANSWER TO THE QUESTION OF IF YOU TOOK THE
10:42AM 22 CISCO CLI OUT, WOULD ANY OF THESE SALES FROM ARISTA HAVE TAKEN
10:42AM 23 PLACE OR SALES OF OTHER COMPARABLE PRODUCTS IN THE MARKETPLACE.
10:42AM 24 THAT QUESTION WAS NEVER ANSWERED. AND I DEPOSED MR. SADANA
10:42AM 25 WHO WAS THEIR SENIOR VICE PRESIDENT, THEIR 30(B) (6) DEPONENT ON

10:42AM 1 DAMAGES, I ASKED HIM SPECIFICALLY, HOW ARE THESE DECISIONS
10:42AM 2 BEING MADE BY CUSTOMERS? DO YOU HAVE ANY VISIBILITY?
10:42AM 3 AND HE SAYS, IN TERMS OF THE RELATIVE RANKINGS OF ALL THE
10:42AM 4 DIFFERENT FEATURES, IT'S A BLACK BOX. WE DON'T KNOW. THEY
10:42AM 5 DON'T TELL US. THEY MAY TELL US CERTAIN FEATURES THAT MAYBE --
10:42AM 6 THE COURT: SO THE SWITCHES ARE NOT CUSTOM SWITCHES?
10:42AM 7 MR. PAK: THEY ARE NOT CUSTOM SWITCHES.
10:42AM 8 SO THESE ARE, FOR THE MOST PART -- THERE ARE CERTAIN CUSTOM
10:42AM 9 SWITCHES WHERE, FOR EXAMPLE, EARLY ON IN THE PROCESS THEY MAY
10:42AM 10 GET SOME FEEDBACK FROM CUSTOMERS.
10:43AM 11 THE COURT: SO THERE ISN'T AN RFQ OR ANYTHING LIKE
10:43AM 12 THAT.
10:43AM 13 MR. PAK: THERE'S AN RFP, IN THE SENSE THAT THEY ARE
10:43AM 14 LOOKING FOR CERTAIN TYPES OF FEATURES THAT THEY WANT TO SEE
10:43AM 15 WHETHER YOUR COMMODITY SWITCHES MEET THOSE REQUIREMENTS AND
10:43AM 16 THERE MAY BE NEGOTIATION AROUND PRICE.
10:43AM 17 BUT THIS IS NOT A SITUATION WHERE ARISTA IS BUILDING A
10:43AM 18 SPECIFIC SWITCH FOR GOOGLE OR A SPECIFIC SWITCH FOR FACEBOOK.
10:43AM 19 THEY MAY BE ASKED TO COMPETE FOR BIDS, BUT THEY ARE ALWAYS
10:43AM 20 USING THEIR GENERIC --
10:43AM 21 THE COURT: SO THEY IDENTIFY THE GENERAL FEATURES THE
10:43AM 22 GENERIC SWITCH HAS.
10:43AM 23 MR. PAK: THAT'S RIGHT.
10:43AM 24 THE COURT: OKAY.
10:43AM 25 MR. PAK: SO I ASKED THEM, HOW CAN YOU TELL WHAT WAS

10:43AM 1 IMPORTANT TO A PARTICULAR CUSTOMER?

10:43AM 2 AND HE SAYS, I DON'T KNOW THE ANSWER TO THAT QUESTION, NO

10:43AM 3 ONE KNOWS THE ANSWER TO THAT QUESTION, IT'S SUBJECTIVE,

10:43AM 4 INDIVIDUALIZED, MANY OF THE CUSTOMERS WON'T EVEN TELL YOU WHY

10:43AM 5 THEY SELECTED A PRODUCT.

10:43AM 6 NOW, THEY DO PICK -- ARISTA DOES CHERRY PICK SOME DOCUMENTS

10:43AM 7 WHERE ARISTA CUSTOMERS HAVE SAID, YOU KNOW, I LIKE THAT

10:43AM 8 FEATURE, YOU KNOW, I LIKE THE FACT THAT YOU HAVE LOW LATENCY,

10:43AM 9 BUT I LIKE THE FACT THAT YOU CAN RECONFIGURE.

10:44AM 10 BUT THAT DOESN'T TELL US ANYTHING ABOUT THE RELATIVE

10:44AM 11 RANKING OF THESE FEATURES WHATSOEVER, BECAUSE THE PROBLEM WE

10:44AM 12 ARE HAVING, YOUR HONOR, IS OUR BELIEF IS THEY COPIED OUR CLI TO

10:44AM 13 A LARGE EXTENT, SO WHEN YOU HAVE TWO PRODUCTS WITH THE SAME

10:44AM 14 CLI, LOOK AND FEEL TO THE USER, WHY WOULD THE CUSTOMER TELL YOU

10:44AM 15 THAT THE CLI WAS AN IMPORTANT DIFFERENTIATOR?

10:44AM 16 THE COURT: RIGHT.

10:44AM 17 MR. PAK: THEY WOULDN'T. THAT'S THE POINT. THAT'S

10:44AM 18 THE BARRIER TO ENTRY.

10:44AM 19 IF YOU WERE ASKED THE QUESTION, IF I WERE TO TAKE AWAY THAT

10:44AM 20 FEATURE, THAT CLI FEATURE, WOULD YOU HAVE EVEN CONSIDERED ANY

10:44AM 21 OF THE OTHER FEATURES?

10:44AM 22 AND MR. SADANA SAYS, I DON'T KNOW THE ANSWER TO THAT

10:44AM 23 QUESTION WITH CERTAINTY, BUT I KNOW THAT FROM ARISTA'S

10:44AM 24 PERSPECTIVE, HAVING A CISCO-LIKE CLI WAS A BARRIER TO ENTRY

10:44AM 25 INTO THE MARKETPLACE.

10:44AM 1 NONE OF THAT IS REFLECTED, YOUR HONOR, IN DR. ELSTEN'S
10:44AM 2 APPORTIONMENT METHODOLOGY WHERE SHE TAKES JUST ONE DOCUMENT OUT
10:44AM 3 OF MANY, FINDS THAT THERE'S ONE DOCUMENT THAT HAD EIGHT
10:44AM 4 FEATURES, OTHERS OTHER DOCUMENTS HAD FIVE, OTHER DOCUMENTS HAD
10:44AM 5 10, 12, FEATURES, AND THESE SWITCHES HAVE MANY, MANY FEATURES,
10:45AM 6 ALL OF THEM HAVE DOZENS, HUNDREDS OF FEATURES.
10:45AM 7 SHE SELECTS ONE DOCUMENT AND SAYS, WELL, THIS DOCUMENT HAS
10:45AM 8 EIGHT FEATURES. SO I'M GOING TO TAKE CLI, WHICH IS ONE OF THE
10:45AM 9 LISTED FEATURES, DIVIDE IT BY EIGHT TO GET TO 12.5.
10:45AM 10 SHE DOES NO FURTHER ANALYSIS AT ALL. NO FOUNDATIONAL FACTS
10:45AM 11 INQUIRY INTO WHETHER THESE FACTORS WOULD HAVE BEEN TREATED
10:45AM 12 EQUALLY OR WHETHER ANY ONE OF THEM SHOULD BE GIVEN RANKING OR
10:45AM 13 NOT.
10:45AM 14 SO YOUR HONOR IS ABSOLUTELY CORRECT IN THE FINJAN CASE TO
10:45AM 15 NOTE THE IMPORTANT PRECEDENT IN THIS DISTRICT, THE STRAGENT
10:45AM 16 CASE, THE GOOD TECH CASE WHICH IS A NORTHERN CALIFORNIA CASE
10:45AM 17 ABOUT NOT ALLOWING EXPERTS TO COME IN WITH THIS TYPE OF
10:45AM 18 METHODOLOGY UNLESS THERE'S FOUNDATIONAL FACTS.
10:45AM 19 THE DIFFERENCE HERE BETWEEN THIS CASE AND THE FINJAN CASE
10:45AM 20 IS THE FINJAN CASE THEY HAD DR. MEDVIDOVIC AND DR. LAYNE-FARRAR
10:45AM 21 THAT WENT INTO SOME OF THAT.
10:45AM 22 THIS IS NOT THAT CASE. THIS IS VERY CLEAR THAT SHE MADE NO
10:46AM 23 ATTEMPT, AND IN FACT, IT WOULD HAVE BEEN VERY DIFFICULT TO DO
10:46AM 24 THAT ON THE FACTUAL RECORD.
10:46AM 25 SO TO US, THIS IS A CLEAR CUT ISSUE. WE DON'T THINK SHE'S

10:46AM 1 GOT ANY BASIS TO DO ANY RELATIVE RANKING. TO THE EXTENT THEY
10:46AM 2 ARE COMING IN AND SAYING THERE'S SOME DOCUMENTS THAT SHOW
10:46AM 3 RELATIVE VALUATION BECAUSE THE FEATURE WAS MENTIONED OR NOT,
10:46AM 4 THAT THAT IS NOT PROBATIVE AT ALL TO THE INTERNAL RANKING
10:46AM 5 WITHIN A CUSTOMER. AND THE BURDEN HERE, AGAIN, IS ON THEM.

10:46AM 6 THE COURT: YEAH.

10:46AM 7 MR. PAK: THEY SHOULD HAVE DONE THE SURVEY, THEY
10:46AM 8 SHOULD HAVE GOTTEN CUSTOMER DISCOVERY IF THEY WANTED TO PROVIDE
10:46AM 9 THIS TYPE OF EVIDENCE.

10:46AM 10 I WILL JUST REMIND YOUR HONOR THAT THE FRANK MUSIC CASE AND
10:46AM 11 THE HARPER ROW CASE IS VERY CLEAR WHY WE HAVE THIS LAW OF
10:46AM 12 BURDEN SHIFTING. WHEN YOU COMINGLE INFRINGING WITH NON
10:46AM 13 INFRINGING CONTRIBUTIONS IN A COPYRIGHTED WORK, THE ACCUSED
10:46AM 14 INFRINGER BEARS THE BURDEN THAT IF THEY ARE SUED ON THAT
10:46AM 15 COPYRIGHT INFRINGEMENT, THEY HAVE TO HAVE A CLEAR AND SOUND
10:46AM 16 METHODOLOGY FOR PROVING UP PROFITS WITH RESPECT TO THEIR
10:46AM 17 CONTRIBUTIONS.

10:46AM 18 IT'S A POLICY DECISION THAT'S BEEN CODIFIED INTO STATUTE.
10:47AM 19 IT'S BEEN WELL ADOPTED AND ENDORSED BY ALL THE COURTS LOOKING
10:47AM 20 AT THIS ISSUE, AND THIS TYPE OF METHODOLOGY, AS A METHODOLOGY
10:47AM 21 ISSUE, NOT A FACTUAL ISSUE, IS FUNDAMENTALLY FLAWED,
10:47AM 22 YOUR HONOR. THAT'S WHY WE ASK DR. ELSTEN'S DISGORGEMENT
10:47AM 23 OPINIONS BE STRUCK.

10:47AM 24 THE COURT: SO LET ME JUST ASK YOU BASED ON -- OF
10:47AM 25 COURSE IN FINJAN I ALLOWED FINJAN THE OPPORTUNITY TO LAY THAT

10:47AM 1 FOUNDATION, WHY SHOULDN'T I DO THE SAME THING HERE?

10:47AM 2 MR. PAK: BECAUSE YOUR HONOR, SHE HASN'T DONE THAT.

10:47AM 3 SO IN THAT CASE DR. FERRAR RELIED ON DR. MEDVIDOVIC WHO WAS

10:47AM 4 A SEPARATE TECHNICAL EXPERT WHO LOOKED AT VALUATION OF

10:47AM 5 TECHNOLOGIES, AND I THINK YOUR HONOR HAD SOME CONCERNs ABOUT

10:47AM 6 HIS OPINIONS AS WELL, BUT AT LEAST THERE WAS AN OPPORTUNITY FOR

10:47AM 7 DR. FARRAR TO SAY, I DIDN'T DO THE RELATIVE RANKING MYSELF BUT

10:47AM 8 SOMEBODY ELSE DID, AND I TOOK THAT INTO CONSIDERATION IN COMING

10:47AM 9 UP WITH MY OPINION THAT THESE SHOULD BE EQUALLY VALUED.

10:47AM 10 AND IN THAT CASE IT WAS A MULTI-FACETTED SECURITY PRODUCT,

10:48AM 11 YOUR HONOR HEARD ABOUT THIS DEFENSE IN DEPTH, EVERY ONE OF

10:48AM 12 THOSE FEATURES IS IMPORTANT WHEN PROVIDING SECURITY. IF I

10:48AM 13 DON'T HAVE A FIREWALL, MY OTHER SECURITY FEATURE IS NOT GOING

10:48AM 14 TO HELP ME VERY MUCH.

10:48AM 15 SO FROM A SECURITY VENDOR'S PERSPECTIVE, IT MAY BE A

10:48AM 16 REASONABLE ASSUMPTION THAT THOSE FEATURES SHOULD BE RANKED

10:48AM 17 EQUALLY.

10:48AM 18 HERE, VERY DIFFERENT. WE ARE TALKING ABOUT HIGHLY

10:48AM 19 SOPHISTICATED CONSUMERS WHO HAVE DIFFERENT NEEDS, WHETHER YOU

10:48AM 20 ARE TALKING ABOUT CLOUD NETWORKING VERSUS YOU ARE TALKING ABOUT

10:48AM 21 ENTERPRISE CUSTOMERS, EACH OF THESE CUSTOMERS ARE MAKING

10:48AM 22 INDIVIDUALIZED DECISIONS.

10:48AM 23 SHE MADE NO ATTEMPT TO GO INTO ANY OF THAT AND SHE JUST --

10:48AM 24 THE COURT: AND SHE DOESN'T RELY ON MR. SEIFERT.

10:48AM 25 MR. PAK: NO, NOT AT THIS POINT AT ALL.

10:48AM 1 SO HER OPINION SORT OF PARALLELS MR. SEIFERT'S ANALYSIS
10:48AM 2 WITH RESPECT TO THE MARKET IMPACT, BUT HE DID NO RELATIVE
10:48AM 3 EVALUATION OF ANY OF THESE FACTORS.
10:48AM 4 HE TESTIFIED THAT HE WAS AN EXPERT IN THOSE MATTERS FOR THE
10:48AM 5 PURPOSE OF THIS CASE. HE DOESN'T FRANKLY EVEN UNDERSTAND THE
10:48AM 6 SWITCHES AT ISSUE AND HE WAS NOT ASKED TO DO THAT. HIS
10:49AM 7 OPINIONS ARE REALLY LOOKING AT THIS QUESTION OF DE FACTO
10:49AM 8 INDUSTRY STANDARD AND THEN THE MARKET IMPACT ANALYSIS WE TALKED
10:49AM 9 ABOUT.
10:49AM 10 BUT NO TECHNICAL EXPERT THAT SHE'S RELYING ON FOR THIS
10:49AM 11 CALCULATION HAS DONE THIS KIND OF RELATIVE RISK RANKING
10:49AM 12 FEATURES.
10:49AM 13 WHAT I EXPECT THE OTHER SIDE TO SAY IS WELL, WE HAVE
10:49AM 14 EVIDENCE SHOWING THIS PARTICULAR FEATURE WAS MENTIONED. THAT'S
10:49AM 15 NOT THE POINT. THE POINT ISN'T WHAT THEY TOLD ARISTA OR CISCO
10:49AM 16 AS BEING ONE OF THE FEATURES THAT THEY USED AS A CRITERIA. THE
10:49AM 17 QUESTION IS HOW DO THEY RANK RELATIVELY, AND MORE IMPORTANTLY,
10:49AM 18 WHERE DOES THE CLI RANK INTERNALLY, WOULD THEY HAVE EVEN BOUGHT
10:49AM 19 THE PRODUCT WITHOUT A CISCO-LIKE CLI. AND NO ONE KNOWS THE
10:49AM 20 ANSWER BECAUSE SHE HASN'T DONE THAT ANALYSIS.
10:49AM 21 THE COURT: AND ONE WOULD NOT EXPECT THE DAMAGES
10:49AM 22 EXPERT TO BE ABLE TO DO THAT ANALYSIS. IT IS APPROVED IN THE
10:49AM 23 LAW THAT THIS DAMAGES EXPERT CAN RELY ON THE OPINIONS OF THE
10:50AM 24 TECHNICAL EXPERTS.
10:50AM 25 MR. PAK: THAT'S CORRECT.

10:50AM 1 THE COURT: BUT SHE DOESN'T --

10:50AM 2 MR. PAK: SHE DOES NOT RELY ON THE TECHNICAL OPINIONS

10:50AM 3 OF THE EXPERTS FOR THAT PURPOSE.

10:50AM 4 AND TWO, YOUR HONOR, WHAT THE LAW PERMITS IS THE DAMAGES

10:50AM 5 EXPERT TO CONDUCT SURVEYS.

10:50AM 6 THE COURT: YEAH.

10:50AM 7 MR. PAK: SO SHE COULD HAVE DONE A REGRESSION SURVEY,

10:50AM 8 SHE COULD HAVE DONE ANY NUMBER OF SURVEYS THAT LOOK INTO

10:50AM 9 RELATIVE VALUATION OF THESE FEATURES FROM A CUSTOMER

10:50AM 10 PERSPECTIVE.

10:50AM 11 AND WE UNDERSTAND THAT SHE CAN'T GO INTERVIEW EVERY SINGLE

10:50AM 12 CUSTOMER, BUT SHE COULD HAVE TAKEN A REPRESENTATIVE SAMPLE OF

10:50AM 13 CUSTOMERS LIKE WE DO IN PATENT CASES, SURVEY THEM TO UNDERSTAND

10:50AM 14 HOW DOES CLI RANK. AND THAT ANALYSIS WAS SIMPLY NOT DONE.

10:50AM 15 THE COURT: OKAY.

10:50AM 16 MR. PAK: THANK YOU.

10:50AM 17 MR. SILBERT: GOOD MORNING, YOUR HONOR.

10:50AM 18 DAVID SILBERT FOR ARISTA.

10:50AM 19 LET ME TOUCH ON A COUPLE OF PRELIMINARY ISSUES AND THEN LET

10:50AM 20 ME TALK ABOUT WHAT MS. ELSTEN ACTUALLY DOES FOR HER

10:50AM 21 APPORTIONMENT ANALYSIS WHICH BEARS ESSENTIALLY NO RESEMBLANCE

10:51AM 22 TO THE DESCRIPTION THAT YOU JUST HEARD FROM MR. PAK.

10:51AM 23 BUT TO BEGIN WITH, YOUR HONOR IS ABSOLUTELY CORRECT THAT

10:51AM 24 DISGORGEMENT IS A BENCH ISSUE FOR THE COURT TO DETERMINE. AND

10:51AM 25 WE PRESENTED THIS MOTION BECAUSE IT IS CERTAINLY SOMETIMES TRUE

10:51AM 1 THAT JUDGES WHO NEED TO MAKE A DETERMINATION AFTER TRIAL WILL
10:51AM 2 SEEK AN ADVISORY OPINION FROM A JURY.

10:51AM 3 YOUR HONOR COULD DO THAT AS ESTOPPEL IF YOU CHOSE, YOU
10:51AM 4 COULD DO IT ON THE ISSUE OF DISGORGEMENT IF YOU CHOSE, THAT'S
10:51AM 5 ENTIRELY UP TO YOU. AND SHOULD YOU DO THAT, WE CERTAINLY
10:51AM 6 BELIEVE IT'S CRITICAL THAT THE JURY, IN PARTICULAR, NOT BE
10:51AM 7 GIVEN AN ISSUE -- WE MOVE WITH RESPECT TO DISGORGEMENT ON
10:51AM 8 DR. CHEVALIER BECAUSE WE DON'T WANT HER TO PRESENT A POSITION
10:51AM 9 TO THE JURY THAT WE BELIEVE IS SIMPLY PRECLUDED BY THE LAW.

10:51AM 10 BUT ULTIMATELY, IT IS YOUR HONOR'S DECISION. THERE MAY
10:51AM 11 HAVE BEEN COURTS, CERTAINLY, WHO HAVE COMMITTED IT TO THE JURY
10:52AM 12 BEFORE. THERE MAY EVEN HAVE BEEN SOME UNCERTAINTY ABOUT THIS
10:52AM 13 ISSUE. BUT TO THE EXTENT THERE WAS, IT WOULD HAVE BEEN
10:52AM 14 RESOLVED BY THE SUPREME COURT IN THE PETRELLA CASE WHICH IS THE
10:52AM 15 COPYRIGHT CASE INVOLVING THE MOVIE *RAGING BULL* WHERE THE
10:52AM 16 SUPREME COURT SPECIFICALLY FOUND DISGORGEMENT IS A DIFFERENT
10:52AM 17 TYPE OF REMEDY THAN ACTUAL DAMAGES, AND DISGORGEMENT UNDER THE
10:52AM 18 COPYRIGHT ACT SPECIFICALLY IS AN EQUITABLE REMEDY, NOT A LEGAL
10:52AM 19 REMEDY.

10:52AM 20 AND IN THAT CASE THE COURT HELD THERE WERE DIFFERENCES
10:52AM 21 THERE THAT AFFECT THE ISSUE OF LACHES, SO LACHES IS TREATED
10:52AM 22 DIFFERENTLY FOR DISGORGEMENT.

10:52AM 23 COURTS IN THE NINTH CIRCUIT AM SINCE THEN HAVE CITED
10:52AM 24 PETRELLA AND SPECIFICALLY DENIED A JURY TRIAL ON DISGORGEMENT.

10:52AM 25 THE COURT: AND DO YOU HAVE A NINTH CIRCUIT CASE FOR

10:52AM 1 ME THAT DENIES THE JURY TRIAL?

10:52AM 2 MR. SILBERT: THERE IS A, AND I CAN'T GIVE YOUR HONOR

10:52AM 3 THE CITE RIGHT NOW, WHERE I WAS GOING WITH THIS, WE INTEND TO

10:52AM 4 MOVE IN LIMINE ON THIS ISSUE BECAUSE IT'S NOT --

10:53AM 5 THE COURT: THE REASON I RAISE IT HERE IS THAT I'M

10:53AM 6 LESS INCLINED TO EVEN ENTERTAIN THE DAUBERT DISCUSSION ON AN

10:53AM 7 ISSUE THAT'S TRIED TO THE COURT BECAUSE I CAN EASILY DISREGARD

10:53AM 8 OPINIONS THAT ULTIMATELY HAVE NO FOUNDATION OR ARE EXCLUDED

10:53AM 9 BECAUSE THEY ARE NOT FOUND IN THE DISCLOSURES.

10:53AM 10 AND I JUST DON'T NEED TO ENGAGE IN IT NOW.

10:53AM 11 SO AGAIN, I NEED TO BE VERY EFFICIENT WITH WHAT I'M

10:53AM 12 SPENDING MY TIME ON HERE, AS DO YOU, AND I'VE NEVER KNOWN

10:53AM 13 DISGORGEMENT TO BE A JURY ISSUE. BUT I'VE NEVER SEEN

10:53AM 14 DISGORGEMENT REQUESTED IN A COPYRIGHT CASE.

10:53AM 15 SO WELL, FOR EXAMPLE, IN THE ORACLE V. GOOGLE CASE, THERE

10:53AM 16 WAS A DISGORGEMENT ISSUE, CORRECT?

10:53AM 17 MR. SILBERT: THERE WAS, BUT THERE WAS NO DAMAGES

10:53AM 18 TRIAL, ULTIMATELY.

10:53AM 19 THE COURT: SO THERE WAS NEVER A DAMAGES TRIAL. AND

10:53AM 20 WERE THERE PRETRIAL RULINGS THAT INDICATED ONE WAY OR THE OTHER

10:53AM 21 OR HAD YOU NOT GOTTEN THERE?

10:54AM 22 MR. SILBERT: I WILL HAVE TO DEFER TO --

10:54AM 23 MR. VAN NEST: I WOULD HAVE TO GO BACK AND LOOK AT

10:54AM 24 THE RECORD. I THINK JUDGE ALSUP DEFERRED IT. HE BIFURCATED,

10:54AM 25 WE DISCUSSED IT, IT WASN'T RESOLVED, IT'S MY RECOLLECTION --

10:54AM 1 AND THEN OF COURSE --

10:54AM 2 THE COURT: HE WAS WISE TO BIFURCATE, HE NEVER HAD TO

10:54AM 3 HEAR IT.

10:54AM 4 MR. VAN NEST: THAT'S RIGHT. TWICE.

10:54AM 5 THE COURT: TWICE. OKAY.

10:54AM 6 MR. SILBERT: WE CAN PROVIDE YOUR HONOR WITH A

10:54AM 7 CITATION TO A CENTRAL DISTRICT --

10:54AM 8 THE COURT: I JUST WANT A CITATION.

10:54AM 9 MR. SILBERT: A CENTRAL DISTRICT OF CALIFORNIA CASE,

10:54AM 10 THE NAME ESCAPES ME RIGHT NOW. THE IMPORTANT THING IS IT'S

10:54AM 11 POST PETRELLA AND IT FINDS BASED ON PETRELLA, IT DENIES A JURY

10:54AM 12 TRIAL.

10:54AM 13 THE COURT: AND PETRELLA IS A COPYRIGHT CASE AS WELL?

10:54AM 14 MR. SILBERT: PETRELLA IS A COPYRIGHT CASE IN THE

10:54AM 15 SUPREME COURT THAT FINDS THAT DISGORGEMENT IS AN EQUITABLE

10:54AM 16 REMEDY. AND IT DISTINGUISHES DISGORGEMENT FROM ACTUAL

10:54AM 17 DAMAGES --

10:54AM 18 THE COURT: SURE. AND MR. PAK, IF YOU HAVE ANYTHING

10:54AM 19 DIFFERENT.

10:54AM 20 MR. PAK: YES.

10:54AM 21 THE COURT: I'M LOOKING FOR A PAGE AND A HALF ON THIS

10:54AM 22 IF YOU WANT TO SUBMIT IT. I JUST REALLY NEED THE CITATIONS

10:55AM 23 BECAUSE I ACTUALLY WILL TAKE A DIFFERENT ROUTE ON THE

10:55AM 24 ELSTEN/CHEVALIER, AND I THINK THAT'S GOING TO WORK FOR YOU AS

10:55AM 25 WELL BECAUSE WE HAVE LOTS OF LATITUDE IN A BENCH TRIAL, IF WE

10:55AM 1 EVEN GET THERE.

10:55AM 2 MR. SILBERT: UNDERSTOOD. SINCE WE DON'T KNOW AT

10:55AM 3 THIS POINT HOW THAT'S GOING TO TURN OUT, IF I MAY, I WOULD LIKE

10:55AM 4 TO JUST ADDRESS --

10:55AM 5 THE COURT: LET'S DO THAT SINCE YOU ARE HERE, YES.

10:55AM 6 MR. SILBERT: AND LET ME SAY ONE THING, FIRST OF ALL,

10:55AM 7 ABOUT THE CAUSAL NEXUS ISSUE.

10:55AM 8 I THINK THAT A MOUNTAIN HAS BEEN MADE OF A MOLE HILL HERE.

10:55AM 9 I DON'T THINK THE COURT NEEDS TO DEVOTE RESOURCES TO IT. IT IS

10:55AM 10 TRUE THAT DR. CHEVALIER, EXCUSE ME, THAT MS. ELSTEN NOTES THAT

10:55AM 11 DR. CHEVALIER DID NOT MAKE ANY PARTICULAR COMMENTS OR FINDINGS

10:55AM 12 TO SUPPORT A NEXUS, BUT MS. ELSTEN THEN TAKES HER ROYALTY BASE

10:55AM 13 ANYWAY AND USES IT AS THE ROYALTY BASE THAT SHE FORMULATES HER

10:55AM 14 OPINION ON.

10:55AM 15 SO ALTHOUGH SHE CRITICIZES THE LACK OF DISCUSSION OF NEXUS

10:56AM 16 IN DR. CHEVALIER'S OPINION, SHE DOESN'T CHANGE, TO BE AS

10:56AM 17 CONSERVATIVE AS POSSIBLE. SHE SAYS, I'M GOING TO ASSUME THAT A

10:56AM 18 NEXUS HAS BEEN PROVEN ANYWAY, AND I'M GOING TO START WITH THIS

10:56AM 19 ROYALTY BASE.

10:56AM 20 THE COURT: WELL, SURE, THAT'S A LEGAL ISSUE, SHE

10:56AM 21 DOESN'T HAVE TO GET BOGGED DOWN WITH IT, NOR COULD SHE GIVE AN

10:56AM 22 OPINION.

10:56AM 23 MR. SILBERT: NOR DOES THE COURT, THAT'S OUR POINT.

10:56AM 24 IT DOESN'T PLAY A ROLE IN THE ACTUAL OPINIONS SHE EXPRESSES --

10:56AM 25 FOR PURPOSES OF THIS MOTION --

10:56AM 1 THE COURT: SO YOU ARE NOT SUGGESTING CISCO HAS TO
10:56AM 2 ESTABLISH ANYTHING MORE THAN THEY HAVE THROUGH THE -- OF THE
10:56AM 3 PROFITS OF THE DIRECT PROFITS OFF OF THE INFRINGING PRODUCT.
10:56AM 4 MR. SILBERT: FOR PURPOSES OF ESTABLISHING A ROYALTY
10:56AM 5 BASE, THAT'S TRUE.
10:56AM 6 THE COURT: OKAY. GOOD. THAT'S GREAT. I'VE LEARNED
10:56AM 7 ABOUT THE LAW AND WE ARE MOVING FORWARD.
10:56AM 8 MR. SILBERT: SO NOW LET'S TALK ABOUT HER
10:56AM 9 DISGORGEMENT OPINION AND HER APPORTIONMENT OF PROFITS.
10:56AM 10 AND LET ME FIRST OF ALL DIRECT YOUR HONOR'S ATTENTION TO
10:57AM 11 WHAT THE ACTUAL LAW IS ON THIS PARTICULAR ISSUE, IT'S NOT THE
10:57AM 12 SAME AS ACTUAL DAMAGES UNDER PATENTS, IT WOULD BE A MISTAKE TO
10:57AM 13 APPLY THOSE SAME CRITERIA.
10:57AM 14 THE COURT: OKAY.
10:57AM 15 MR. SILBERT: AND THE NINTH CIRCUIT -- AND BY THE
10:57AM 16 WAY, I THINK EVEN IF THE COURT DID APPLY THOSE CRITERIA,
10:57AM 17 NOTHING WOULD BE EXCLUDED HERE.
10:57AM 18 BUT LET'S BE CLEAR, THE NINTH CIRCUIT HAS SAID NUMEROUS
10:57AM 19 TIMES AND THE SUPREME COURT, THAT WHEN WE ARE TALKING ABOUT
10:57AM 20 APPORTIONMENT OF PROFITS FOR PURPOSES OF A DISGORGEMENT
10:57AM 21 ANALYSIS, WE ALL RECOGNIZE THAT IT'S VERY DIFFICULT TO DO THAT,
10:57AM 22 THERE ARE NO CERTAIN BOUNDARIES. AND THE SUPREME COURT SAYS,
10:57AM 23 WHAT IS REQUIRED IS ONLY A REASONABLE APPROXIMATION.
10:57AM 24 THAT'S QUOTED BY THE NINTH CIRCUIT IN THE CREAM RECORDS
10:57AM 25 CASE. AND THE CREAM RECORDS PANEL GOES ON TO SAY, YOU KNOW,

10:57AM 1 LOOK, ULTIMATELY, CREAM, THAT'S THE PLAINTIFF'S CALCULATION, IS
10:58AM 2 IN THE END, NO LESS SPECULATIVE THAN THAT OF THE COURT.

10:58AM 3 THEY SAY YOURS IS PRETTY SPECULATIVE, THE DISTRICT COURTS'
10:58AM 4 IS PRETTY SPECULATIVE.

10:58AM 5 I WOULD COMMEND YOUR HONOR TO READ THAT CASE AND COMPARE
10:58AM 6 THE ACTUAL ANALYSIS DONE IN THAT CASE, WHICH WAS REALLY LICKING
10:58AM 7 YOUR FINGER AND PUTTING IT UP TO THE WIND BY THE DISTRICT. AND
10:58AM 8 THE NINTH CIRCUIT SAID, WELL, IT'S GOOD ENOUGH.

10:58AM 9 THE COURT: AND THE CASE LAW ALSO SUGGESTS THAT IN
10:58AM 10 THE ABSENCE OF A DEFENSE APPORTIONMENT, I STILL WHEN THE RECORD
10:58AM 11 IS CLEAR, WOULD HAVE TO RULE ON SOME REASONABLE APPORTIONMENT.

10:58AM 12 MR. SILBERT: I WOULD SAY CASE LAW DOESN'T SUGGEST
10:58AM 13 THAT, THE CASE LAW MANDATES THAT.

10:58AM 14 BUT THAT'S CORRECT. AND IF YOUR HONOR FOR A MINUTE
10:58AM 15 COMPARED THE APPORTIONMENT METHODOLOGY THAT WAS APPROVED BY THE
10:58AM 16 NINTH CIRCUIT IN CREAM RECORDS TO THE EXTREMELY DETAILED AND
10:58AM 17 FACT-BASED METHODOLOGY USED BY MS. ELSTEN, THERE'S NO
10:58AM 18 COMPARISON, THERE'S SIMPLY NO COMPARISON. AND MORE TO THE
10:58AM 19 POINT I MADE RIGHT HERE IS, THE STANDARD THAT GETS REQUIRED TO
10:58AM 20 THIS TYPE OF APPORTIONMENT ON DISGORGEMENT IS NOT THE PATENT'S
10:59AM 21 ACTUAL PROOF OF ACTUAL DAMAGES.

10:59AM 22 THERE'S MORE QUOTES AGAIN FROM THE NINTH CIRCUIT IN THE
10:59AM 23 ABEND CASE QUOTING JUDGE LEARNED HAND WHO SAYS THERE'S REALLY
10:59AM 24 NO REAL STANDARD THAT CAN GOVERN THIS. AND THE NINTH CIRCUIT
10:59AM 25 SAYS, WE RECOGNIZE COURTS CAN'T BE EXPECTED TO DETERMINE WITH

10:59AM 1 MATHEMATICAL EXACTNESS AN APPORTIONMENT OF PROFITS. WE REQUIRE
10:59AM 2 ONLY A REASONABLE AND JUST APPORTIONMENT.

10:59AM 3 THAT'S ALL THAT IS REQUIRED.

10:59AM 4 THE COURT: BUT I DON'T THINK MR. PAK IS ARGUING THAT
10:59AM 5 POINT. WHAT HE'S SAYING IS THAT THERE'S NO FOUNDATION FOR THE
10:59AM 6 EQUAL VALUE TO EACH OF THE ELEMENTS OF THE SWITCH.

10:59AM 7 IT'S AN EVIDENTIARY ISSUE HE'S CONTESTING, NOT A LEGAL
10:59AM 8 STANDARD. YOU DON'T HAVE TO PROVE IT TO A REASONABLE
10:59AM 9 CERTAINTY. OKAY. THAT'S FINE. I DON'T THINK THAT'S ISSUE
10:59AM 10 BEFORE ME.

10:59AM 11 MR. SILBERT: SO LET ME GET TO HIS --

10:59AM 12 THE COURT: NOW IT MAY BE SIMPLY THAT THE TRIER OF
10:59AM 13 FACT, WHETHER IT'S ME OR THE JURY, CAN SIMPLY REJECT IT AS NOT
11:00AM 14 BEING CREDIBLE, WHICH OF COURSE ANY TRIER OF FACT CAN DO WITH
11:00AM 15 ANY OPINION.

11:00AM 16 SO WE ARE JUST AT THE THRESHOLD OF UNDER THIS CREAM RECORDS
11:00AM 17 STANDARD, WOULD I BE WISE TO LET IT IN AND SEE HOW CREDIBLE IT
11:00AM 18 IS AND HOW IT STANDS UP TO CROSS-EXAMINATION AND REBUTTAL.

11:00AM 19 MR. SILBERT: RIGHT.

11:00AM 20 AND HIS FACTUAL STATEMENTS ARE INCORRECT ABOUT SAYING
11:00AM 21 THERE'S NO FOUNDATION. AND I WANT TO GET TO THAT. BUT I DO
11:00AM 22 WANT TO MAKE THE POINT, THAT WHETHER OR NOT AN EQUAL
11:00AM 23 APPORTIONMENT WOULD BE ADMISSIBLE AND VALID UNDER A PATENT
11:00AM 24 DAMAGES STANDARD WHERE A PLAINTIFF IS PROVING ACTUAL DAMAGES,
11:00AM 25 AND THOSE ARE THE CASES THAT MR. PAK CITES, THAT'S THE STANDARD

11:00AM 1 HE'S APPLYING. EVEN THEN, I THINK IT WOULD CLEARLY BE
11:00AM 2 ADMISSIBLE IN THE INFORMATION AT ISSUE HERE.
11:00AM 3 BUT THAT IS NOT THE STANDARD. AND I THINK CLEARLY, AGAIN,
11:00AM 4 IF YOUR HONOR WERE TO LOOK AT WHAT THE COURT DID IN CREAM
11:01AM 5 RECORDS AND OTHER CASES, CLEARLY WHAT'S DONE HERE FAR SURPASSES
11:01AM 6 THAT IN TERMS OF RIGOR, IN TERMS OF THE AMOUNT OF DATA, WHICH
11:01AM 7 IS ACTUALLY CONTRARY TO WHAT MR. PAK SAID, EXTREMELY EXTENSIVE
11:01AM 8 AND SO FORTH.
11:01AM 9 BUT LET ME GET TO THAT.
11:01AM 10 THE COURT: AND YOU OF COURSE CAN ASK YOUR COLLEAGUES
11:01AM 11 AT WILSON SONSINI WHETHER THEY -- WHAT KIND OF FOUNDATION WAS
11:01AM 12 NECESSARY IN THE FINJAN CASE BECAUSE THEY KNOW ALL TOO WELL.
11:01AM 13 MR. SILBERT: IF I CAN JUST TURN TO SLIDE 10,
11:01AM 14 YOUR HONOR.
11:01AM 15 AND THERE'S NO WAY THAT THE COURT COULD DECIDE THIS MOTION
11:01AM 16 WITHOUT READING MS. ELSTEN'S ACTUAL OPINIONS WHICH APPEAR AT
11:01AM 17 PAGES 80 THROUGH 94, SPECIFICALLY, ALTHOUGH SHE DOES REFER BACK
11:01AM 18 TO MANY OTHER SECTIONS OF HER REPORT, IN HER REPORT OF
11:01AM 19 JULY 13TH.
11:01AM 20 AS I SAID AT THE BEGINNING, YOUR HONOR WON'T RECOGNIZE THEM
11:01AM 21 FROM THE WAY MR. PAK DESCRIBED THEM, THEY BEAR NO RESEMBLANCE
11:01AM 22 WHATSOEVER TO THE CHARACTERIZATION THAT HE GAVE OF THEM. BUT
11:02AM 23 ONE OF THE THINGS THAT MR. PAK SAID WAS SHE DOESN'T DO ANY KIND
11:02AM 24 OF WEIGHING AT ALL, AND IN FACT SHE SAYS IN HER DEPOSITION,
11:02AM 25 ACCORDING TO MR. PAK, THAT SHE DOESN'T WEIGH ANYTHING AND

11:02AM 1 THEREFORE THAT'S DISQUALIFYING.

11:02AM 2 SHE ACTUALLY, THESE ARE ALL QUOTATIONS FROM HER REPORT AT

11:02AM 3 PAGES 85 THROUGH 87, SHE ACTUALLY DOES A LOT OF WEIGHING AND

11:02AM 4 SHE DOES RELY ON MR. SEIFERT, AMONG OTHER SOURCES, AND SHE

11:02AM 5 TALKS ABOUT HOW THE FACTORS ARE WEIGHED.

11:02AM 6 HERE IN THE FIRST PARAGRAPH SHE SAYS, HOWEVER, AS DISCUSSED

11:02AM 7 EARLIER AND SUPPORTED BY APPENDIX D, THE PREPONDERANCE OF THE

11:02AM 8 EVIDENCE AVAILABLE IN THE CASE INDICATES THAT MANY, IF NOT MOST

11:02AM 9 OF THE FEATURES IDENTIFIED, WERE OF MORE IMPORTANCE TO MORE

11:02AM 10 CUSTOMERS THAN THE NATURE OF THE CLI.

11:02AM 11 THAT'S REFERRING TO A LOT OF OTHER INFORMATION --

11:02AM 12 THE COURT: WHAT'S APPENDIX D?

11:02AM 13 MR. SILBERT: APPENDIX D, I WOULD NEED TO CHECK. BUT

11:03AM 14 SHE'S ALSO REFERRING TO A PRIOR DISCUSSION.

11:03AM 15 THE COURT: WELL, WE CAN MOVE ON.

11:03AM 16 MR. SILBERT: SHE TALKS ABOUT HOW -- IN THE NEXT

11:03AM 17 PARAGRAPH SHE TALKS ABOUT HOW CONTINUED INVESTMENT IN R&D AND

11:03AM 18 NUMEROUS FEATURES OVER THE TIME PERIOD HAS CAUSED THE RELATIVE

11:03AM 19 IMPORTANCE OF THE CLI TO DIMINISH FURTHER OVER TIME TO THE

11:03AM 20 OVERALL VALUE OF THE SOFTWARE, MEANING IT'S WEIGHTED FURTHER

11:03AM 21 EVEN LESS.

11:03AM 22 SHE SAYS AT THE BOTTOM SHE LOOKS AT ALL THE BLOCK DIAGRAMS.

11:03AM 23 AND SHE SAYS, I UNDERSTAND THAT WITHOUT SYSDB OR LINUX KERNEL,

11:03AM 24 EOS WOULD NOT WORK. THUS, THESE FEATURES MAY HAVE A HIGHER

11:03AM 25 IMPORTANCE THAN OTHERS. CONVERSELY. I UNDERSTAND SEVERAL LIST

11:03AM 1 COMPONENTS SUCH AS CLI, ARE NOT REQUIRED.

11:03AM 2 SHE SAYS, BY ASSUMING EACH BLOCK IS OF EQUAL VALUE, THE

11:03AM 3 VALUE OF THE CLI IS LIKELY OVERSTATED.

11:04AM 4 LET ME POINT OUT JUST SOME EXAMPLES, THERE'S NO WAY IN THE

11:04AM 5 TIME ALLOTTED WE COULD GO THROUGH HER ENTIRE OPINION ON

11:04AM 6 APPORTIONMENT, BUT SHE DOES A QUITE EXTENSIVE ANALYSIS OF

11:04AM 7 WEIGHTING DIFFERENT FEATURES WITHIN THE OPERATING SYSTEM

11:04AM 8 AND HERE'S WHAT HE SHE ACTUALLY DOES, INSTEAD OF WHAT CISCO

11:04AM 9 IS CLAIMING SHE DOES. AT THE END OF ALL OF THAT, WHAT SHE SAYS

11:04AM 10 IS -- WHAT SHE SAYS IS, HERE'S A RANGE, AND SHE GIVES A

11:04AM 11 PERCENTAGE RANGE. I'VE BLACKED OUT THE NUMBERS, AND I'M GOING

11:04AM 12 TO HAVE THIS SLIDE HERE, BUT --

11:04AM 13 THE COURT: I THINK I HAVE THIS ONE.

11:04AM 14 MR. SILBERT: HERE'S A RANGE, I'M LOOKING AT ALL OF

11:04AM 15 THIS DATA, AND THERE'S EXTENSIVE AMOUNTS OF DATA OF WHAT YOU

11:04AM 16 COULD SAY THE CLI IS WORTH. SHE SAYS, IF I TREAT THE CLI AS

11:04AM 17 EQUAL, EQUALLY WEIGHTED ON ALL THESE OTHER FACTORS, AND I

11:04AM 18 POINTED THIS OUT BEFORE, SHE SAYS, I'M ACTUALLY WEIGHTING IT

11:04AM 19 TOO HIGH BASED ON ALL THIS OTHER EVIDENCE THAT I'VE LOOKED AT

11:04AM 20 THAT INDICATES IT HASN'T LOWERED, BUT I'M GOING TO ERR IN FAVOR

11:05AM 21 OF CISCO AND PICK THE HIGHEST RANGE THAT I COULD PICK, EVEN

11:05AM 22 THOUGH I THINK IT'S AN ERROR, IT'S TOO HIGH, I'M ERRING ON THE

11:05AM 23 SIDE OF BEING TOO HIGH FOR CISCO. THAT'S WHAT I'M GOING TO DO.

11:05AM 24 NOW THAT, IF YOUR HONOR READS CISCO'S BRIEFING ON OUR

11:05AM 25 MOTION DIRECTED TO DR. CHEVALIER, THAT'S EXACTLY WHAT THEY SAY

11:05AM 1 THE LAW REQUIRES. THEY SAY YOU ARE SUPPOSED TO ERR IN FAVOR OF
11:05AM 2 THE PLAINTIFF.

11:05AM 3 THE COURT: YEAH.

11:05AM 4 MR. SILBERT: SO THAT'S WHAT SHE DOES. IT'S NOT THAT
11:05AM 5 SHE DOES NO WEIGHTING. SHE DOES A LOT OF WEIGHTING.

11:05AM 6 THE COURT: WHAT ABOUT HER DEPOSITION TESTIMONY,
11:05AM 7 THOUGH?

11:05AM 8 MR. SILBERT: IT'S A SINGLE QUESTION AND ANSWER ABOUT
11:05AM 9 A SINGLE TABLE. IF YOU LOOK AT THE SLIDE, IT SAYS, EXCLUDING
11:05AM 10 YOUR ANALYSIS OF THE RFP'S, AND IN THIS TABLE DID YOU CONSIDER
11:05AM 11 RELATIVE IMPORTANCE. AND SHE SAYS, IN THIS TABLE I DIDN'T.
11:05AM 12 BUT THAT'S NOT HER WHOLE OPINION.

11:05AM 13 SO TO SAY THAT SHE DID NO WEIGHTING IS SIMPLY NOT TRUE. TO
11:05AM 14 SAY, AS MR. PAK DID, THAT SHE JUST LOOKED AT ONE DOCUMENT AND
11:06AM 15 THAT'S HER WHOLE OPINION IS NOT EVEN CLOSE TO TRUE. SHE LOOKED
11:06AM 16 AT LITERALLY THOUSANDS OF PAGES OF VERY DENSE INFORMATION.

11:06AM 17 AND AGAIN, I DO NOT WANT TO BELABOR THE COURT, AND WE DON'T
11:06AM 18 BEGIN TO HAVE TIME, BUT SHE LOOKS AT, SHE ANALYZES THE
11:06AM 19 THOUSANDS OF RFP'S AND DOES A STATISTICAL ANALYSIS AND
11:06AM 20 DETERMINES HOW MANY OF THEM ASK ABOUT, AND SHE POINTS OUT
11:06AM 21 THAT CUSTOMERS IN RFP'S LIST THE FEATURES THEY WANT. THAT'S
11:06AM 22 THE PURPOSE OF THESE RFP'S AND IT'S CLEAR LOOKING AT THEM THAT
11:06AM 23 THEY DO.

11:06AM 24 HOW MANY MENTION A CLI AT ALL? SHE LOOKS AT THAT DATA AND
11:06AM 25 THOSE SPECIFIC PERCENTAGES. HOW MANY MENTION AN INDUSTRY

11:06AM 1 STANDARD CISCO-LIKE CLI? SHE HAS SPECIFIC PERCENTAGES ABOUT
11:06AM 2 THAT.

11:06AM 3 SHE LOOKS AT CERTAIN RFP'S FROM ONE VERY SIGNIFICANT
11:06AM 4 CUSTOMER THAT ACTUALLY ASSIGNS A NUMERICAL WEIGHT TO EACH
11:06AM 5 FEATURE, EVERY SINGLE FEATURE. AND SHE SAYS, WELL, THIS IS A
11:07AM 6 PRETTY GOOD INDICATION OF HOW MUCH VALUE THEY PLACE ON EACH
11:07AM 7 FEATURE, THAT CUSTOMER, ABOUT -- THERE'S A WEIGHT THEY APPLY TO
11:07AM 8 CLI ABOUT -- THERE'S A SEPARATE ENTRY FOR A FAMILIAR CLI, AND
11:07AM 9 THEY SAY SPECIFICALLY -- WE DON'T EVEN PLAN TO USE THE FAMILIAR
11:07AM 10 CLI. SO THEY ESSENTIALLY, WE DON'T CARE WHETHER YOU HAVE ONE
11:07AM 11 OR NOT.

11:07AM 12 SHE TAKES THAT INTO ACCOUNT. AND THE NUMERICAL WEIGHTS.

11:07AM 13 SHE LOOKS AT MARKETING DOCUMENTS AND DOES EXTENSIVE
11:07AM 14 ANALYSIS OF MARKETING DOCUMENTS, WHAT THEY MENTION, WHAT THEY
11:07AM 15 DON'T MENTION, WHAT CATEGORIES THEY LIST, HOW THEY DESCRIBE
11:07AM 16 THINGS. OTHER TECHNICAL DOCUMENTS. IT'S VERY, VERY DETAILED.

11:07AM 17 AND AGAIN, IT'S -- YOUR HONOR MIGHT FORM ONE CONCLUSION
11:07AM 18 LISTENING TO MR. PAK DESCRIBE WHAT SHE DID. IF YOUR HONOR
11:07AM 19 LOOKS AT WHAT MS. ELSTEN ACTUALLY DID AND PARTICULARLY COMPARES
11:07AM 20 IT TO THE STANDARD SET BY THE NINTH CIRCUIT FOR AN
11:07AM 21 APPORTIONMENT ANALYSIS, THERE'S NO WAY IT DOESN'T PASS MUSTER.

11:07AM 22 THE COURT: OKAY. ALL RIGHT. SHOULD WE MOVE ON TO
11:07AM 23 CHEVALIER THEN?

11:08AM 24 MR. PAK: YES.

11:08AM 25 THE COURT: SO MR. SILBERT, ARE YOU GOING TO START?

11:08AM 1 MR. SILBERT: I AM.

11:08AM 2 SO YOUR HONOR, THERE ARE TWO OPINIONS EXPRESSED BY

11:08AM 3 DR. CHEVALIER THAT ARE NOT PROPER EXPERT TESTIMONY AND THAT WE

11:08AM 4 ARE MOVING TO EXCLUDE. THE FIRST IS WHAT SHE CALLS HER NO

11:08AM 5 APPORTIONMENT DISGORGEMENT OPINION.

11:08AM 6 AND WHAT'S SHOWN HERE ON SLIDE THREE IS SIMPLY AN EXCERPT

11:08AM 7 FROM ONE OF HER EXHIBITS WHERE SHE SHOWS A SUMMARY OF THE

11:08AM 8 DAMAGES, BUT IT'S SIMPLY HERE AS AN INDICATION THAT SHE'S GOT

11:08AM 9 TWO OF WHAT SHE CALLS CASES, CASE 1 AND 3 WHERE SHE APPLIES

11:08AM 10 ZERO APPORTIONMENT

11:08AM 11 THE COURT: AS WAS ARGUED BY CISCO, SHE STARTS WITH

11:08AM 12 SAYING, BECAUSE ARISTA DIDN'T MEET ITS BURDEN TO SHOW

11:09AM 13 APPORTIONMENT, THEN THERE'S NO EVIDENCE THEREFORE THERE'S NO

11:09AM 14 APPORTIONMENT. IT'S NOT THAT SHE'S SAYING THAT I'VE STUDIED

11:09AM 15 THE MARKET AND NO APPORTIONMENT IS APPROPRIATE. THAT'S A BIG

11:09AM 16 DIFFERENCE.

11:09AM 17 MR. SILBERT: WELL, IT IS A BIG DIFFERENCE, BUT IT

11:09AM 18 DOESN'T HELP CISCO. IT DOESN'T HELP BECAUSE THE WAY -- UNDER

11:09AM 19 THE CREAM RECORDS CASE AND OTHER NINTH CIRCUIT CASE LAW, THE

11:09AM 20 ONLY SITUATION OR TWO SITUATIONS WHERE A PLAINTIFF CAN REQUEST

11:09AM 21 100 PERCENT OF THE DAMAGES, ARE WHERE AN EXPERT ACTUALLY DOES

11:09AM 22 WHAT YOUR HONOR WAS CLEAR TO POINT OUT AND CISCO WAS CLEAR TO

11:09AM 23 POINT OUT SHE DID NOT DO.

11:09AM 24 THERE ARE CASES WHERE A HUNDRED PERCENT OF THE PROFITS

11:09AM 25 MIGHT BE DUE TO INFRINGEMENT.

11:09AM 1 THE COURT: OH, SURE, OF COURSE.

11:09AM 2 MR. SILBERT: IF I BOOTLEG A MOVIE AND I SELL IT,

11:09AM 3 PROBABLY ALL THOSE PROFITS ARE COMING FROM MY INFRINGEMENT.

11:09AM 4 IF I'M SELLING A TV AND SOMEBODY IS SAYING THESE BUTTONS ON

11:09AM 5 THE REMOTE CONTROL ARE OURS --

11:09AM 6 THE COURT: AND I WILL HEAR FROM MR. PAK ON THIS, IF

11:10AM 7 SHE'S GOING TO TESTIFY THAT I'VE EVALUATED DR. ELSTEN'S OPINION

11:10AM 8 ON APPORTIONMENT, I FIND IT, IT HAS -- IT SHOULD BE GIVEN NO

11:10AM 9 WEIGHT. IT'S FULL OF HOLES, YOU SHOULD DISREGARD IT. AND IF

11:10AM 10 THERE'S NO EVIDENCE WHICH IS, AND THIS IS OF COURSE ATTORNEY

11:10AM 11 ARGUMENT, THEN IT'S 100 PERCENT.

11:10AM 12 NOW MAYBE IT'S ATTORNEY ARGUMENT. AND MAYBE DR. CHEVALIER

11:10AM 13 SHOULDN'T BE THE ONE TO SAY THE HUNDRED PERCENT. AND THE CISCO

11:10AM 14 SHOULD ARGUE TO THE JURY THAT THEY ARE TO DISREGARD

11:10AM 15 DR. ELSTEN'S APPORTIONMENT, AND BECAUSE OF THE LEGAL STANDARD

11:10AM 16 THEY SHOULD FIND IT'S 100 PERCENT, IF IT GOES TO THE JURY, OF

11:10AM 17 COURSE.

11:10AM 18 MR. SILBERT: RESPECTFULLY, YOUR HONOR, IT'S NOT EVEN

11:10AM 19 ATTORNEY ARGUMENT, IT WOULD BE ERROR. IT WOULD BE ERROR TO

11:10AM 20 REQUEST 100 PERCENT OF THE PROFITS. AND I UNDERSTAND THIS IS A

11:10AM 21 LITTLE BIT OF AN UNUSUAL SITUATION --

11:10AM 22 THE COURT: WELL, I DON'T KNOW IF IT'S ERROR TO

11:10AM 23 REQUEST IT. IT MIGHT BE ERROR TO -- I THINK EVEN UNDER YOUR

11:10AM 24 VIEW OF -- EVEN IF THIS GOES TO THE JURY, AND LET'S SAY CISCO

11:10AM 25 WAS PERSUASIVE AND IT CAME OUT AT 100 PERCENT, I THINK THAT I

11:11AM 1 STILL, ON POST-TRIAL EITHER POST-VERDICT BEFORE JUDGMENT, I
11:11AM 2 WOULD STILL BE AUTHORIZED AND EMPOWERED TO MODIFY THAT
11:11AM 3 APPORTIONMENT BASED ON THE EVIDENCE. DON'T YOU AGREE?
11:11AM 4 MR. SILBERT: WELL, YES --
11:11AM 5 THE COURT: SO I DON'T THINK IT WOULD BE ERROR FOR ME
11:11AM 6 TO ALLOW THE ARGUMENT, BECAUSE IT IS A VALID THEORY.
11:11AM 7 MR. SILBERT: FAIR POINT.
11:11AM 8 THE COURT: IT JUST MAY BE THE EVIDENCE DOESN'T
11:11AM 9 SUPPORT IT.
11:11AM 10 SO NOW I THINK I'M ACTUALLY AT THE POINT WHERE I HAVE TO
11:11AM 11 DETERMINE WHETHER AN EXPERT CAN GIVE AN OPINIONS THAT ACTUALLY
11:11AM 12 A LEGAL ARGUMENT ON THE FAILURE OF PROOF, BECAUSE YOU DO HAVE
11:11AM 13 THE BURDEN OF APPORTIONMENT, THERE'S NO QUESTION.
11:11AM 14 MR. SILBERT: YES.
11:11AM 15 THE COURT: BUT DR. CHEVALIER CAN SAY, I DON'T FIND
11:11AM 16 DR. ELSTEN'S ECONOMIC ANALYSIS PERSUASIVE AT ALL AND YOU SHOULD
11:11AM 17 DISREGARD IT. SHE CAN POKE HOLES IN IT.
11:12AM 18 MR. SILBERT: YES.
11:12AM 19 THE COURT: BUT THE NEXT STEP OF SAYING THEREFORE YOU
11:12AM 20 ARE LEFT WITH HAVING TO AWARD 100 PERCENT IS PROBABLY NOT THE
11:12AM 21 SUBJECT OF HER EXPERT OPINION.
11:12AM 22 MR. SILBERT: AND THAT STEP, IT ALSO WOULD BE
11:12AM 23 INCONSISTENT WITH NINTH CIRCUIT CASE LAW.
11:12AM 24 AND THAT'S THE POINT I WANT TO MAKE AND I DO WANT TO POINT
11:12AM 25 OUT TO YOUR HONOR BECAUSE IT'S -- I THINK IT'S AN EASY CHAIN OF

11:12AM 1 LOGIC TO TAKE THE STEPS THAT YOUR HONOR WAS DESCRIBING, BUT IT
11:12AM 2 ACTUALLY IN THIS PARTICULAR CASE, LEADS YOU TO AN IMPROPER
11:12AM 3 RESULT, BECAUSE IT'S EASY TO SAY, WELL YOU HAVE THE BURDEN AND
11:12AM 4 THEREFORE IF YOU DON'T CARRY YOUR BURDEN TO APPORTION, MAYBE
11:12AM 5 THEY GET EVERYTHING.

11:12AM 6 BUT IN THE CREAM RECORDS CASE IN PARTICULAR AND THE ABEND
11:12AM 7 CASE AND OTHER CASES THAT WE CITE, ABEND DISCUSSES SOME OTHERS,
11:12AM 8 WHAT THEY EXPLAINED IS THAT'S NOT THE WAY THE BURDEN OF PROOF
11:12AM 9 WORKS IN THIS PARTICULAR CASE WHERE YOU ARE TALKING ABOUT AN
11:12AM 10 EQUITABLE REMEDY OF DISGORGEMENT.

11:12AM 11 SO THE FACTS OF THE CREAM RECORDS CASE ARE PARTICULARLY
11:12AM 12 INSTRUCTIVE. IN THAT CASE THE INFRINGER PUT ON NO EVIDENCE.
11:13AM 13 AND THAT'S WHAT THEY SAID IN THE CASE, THEY DIDN'T PUT ON ANY
11:13AM 14 EVIDENCE AT ALL ON APPORTIONMENT, SO CLEARLY THEY DIDN'T CARRY
11:13AM 15 THEIR BURDEN. AND THE PLAINTIFF SAID IN THE NINTH CIRCUIT THEY
11:13AM 16 DIDN'T PUT ON ANY EVIDENCE SO THEREFORE WE SHOULD GET WHAT WE
11:13AM 17 ASKED FOR.

11:13AM 18 THE NINTH CIRCUIT SAYS ALTHOUGH THE STATUTE IMPOSES UPON
11:13AM 19 THE INFRINGER THE BURDEN OF SHOWING THE ELEMENTS OF PROFIT
11:13AM 20 ATTRIBUTABLE TO FACTORS OTHER THAN THE COPYRIGHTED WORK,
11:13AM 21 NONETHELESS, WHETHER IT IS CLEAR AS IT IS IN THIS CASE THAT NOT
11:13AM 22 ALL THE PROFITS ATTRIBUTABLE TO THE INFRINGING MATERIAL, THE
11:13AM 23 COPYRIGHT OWNER IS NOT ENTITLED TO RECOVER ALL OF THOSE
11:13AM 24 PROFITS.

11:13AM 25 THEY TALK ABOUT THE COURT HAVING A DUTY TO MAKE AN

11:13AM 1 APPORTIONMENT EVEN IF IT THE DEFENDANT DOESN'T DO IT. AND THEY
11:13AM 2 TALK ABOUT --

11:13AM 3 THE COURT: BUT I GUESS, LET ME BACK UP, I DON'T HAVE
11:13AM 4 CREAM RECORDS RIGHT HERE, THERE'S A DIFFERENCE BETWEEN ALLOWING
11:13AM 5 THE EVIDENCE, AND I'M NOT INCLINED TO ALLOW THE EVIDENCE OF
11:13AM 6 ZERO APPORTIONMENT, I THINK IT'S LEGAL ARGUMENT, ALLOWING THE
11:14AM 7 ARGUMENT IS DIFFERENT THAN THE ULTIMATE JUDGMENT IN THE CASE.

11:14AM 8 AND SO BECAUSE, I MEAN I'M DOUBTFUL THAT THIS IS GOING TO
11:14AM 9 THE JURY, AND BECAUSE IT IS -- MY GUESS IS THE REVENUE NUMBER
11:14AM 10 WILL NOT BE A CONTESTED ISSUE AND THE PERCENTAGE, I WILL HAVE
11:14AM 11 OPINIONS, IT'S JUST SOME BASIC ARITHMETIC HERE ON DISGORGEAMENT.
11:14AM 12 I'M NOT INCLINED, IF I DON'T HAVE TO, TO SEND IT TO THE JURY
11:14AM 13 FOR AN ADVISORY. ACTUAL DAMAGES BEING SO DIFFERENT.

11:14AM 14 AND SO I DON'T THINK IT'S ERROR TO LET CISCO ARGUE THE
11:14AM 15 HUNDRED PERCENT.

11:14AM 16 MR. SILBERT: WELL, I GUESS I DON'T WANT TO SPLIT
11:14AM 17 HAIRS, BUT WOULD IT BE ERROR IF THEY ARGUED IT BUT IT WASN'T
11:14AM 18 ACTUALLY AWARDED. I WOULD SUGGEST THAT IT COULD NOT BE AWARDED
11:14AM 19 UNDER THE FACTS OF THIS CASE, IT WOULD BE ERROR TO AWARD IT AND
11:14AM 20 IF IT'S ERROR TO AWARD IT I DON'T SEE WHY YOUR HONOR WOULD LET
11:15AM 21 THEM ARGUE FOR IT CERTAINLY TO A JURY --

11:15AM 22 THE COURT: IT CERTAINLY APPEARS WITHOUT DISPUTE IN
11:15AM 23 THIS CASE THAT CISCO'S CLI IS ONLY SOME PORTION OF THE ALLEGED
11:15AM 24 INFRINGING PRODUCT AND IT HAS SOME PERCENTAGE VALUE -- I MEAN,
11:15AM 25 IT'S ACTUALLY HARD TO IMAGINE THAT IT COULD BE 100 PERCENT OF

11:15AM 1 THE VALUE. AND DR. CHEVALIER DOESN'T OFFER -- DOES SHE OFFER
11:15AM 2 HER OWN?

11:15AM 3 MR. PAK: NO, SHE DOES NOT, YOUR HONOR.

11:15AM 4 THE COURT: AND SHE DOESN'T NEED TO.

11:15AM 5 MR. SILBERT: SHE HAS AN ADJUSTED APPORTIONMENT. SHE

11:15AM 6 OFFERS AN ALTERNATIVE APPORTIONMENT TO MS. ELSTEN.

11:15AM 7 THE COURT: WHICH IS WHAT PERCENTAGE?

11:15AM 8 MR. SILBERT: I BELIEVE IT'S 12.5 FOR THE TOTAL.

11:15AM 9 MR. PAK: THAT'S ONLY CORRECTING THE MISTAKES IN

11:15AM 10 DR. ELSTEN'S METHODOLOGY WHICH SHE SUGGESTS, BUT WE CAN GET

11:15AM 11 INTO IT MORE, YOUR HONOR, WE DON'T NEED TO EXPLAIN IT RIGHT

11:15AM 12 NOW.

11:16AM 13 THE COURT: OKAY. SO YOU ARE ASKING THAT I EXCLUDE

11:16AM 14 DR. CHEVALIER'S OPINION ON NO APPORTIONMENT AND THEN THERE

11:16AM 15 WAS --

11:16AM 16 MR. SILBERT: LOST PROFITS SCENARIO 3, AND WHAT I

11:16AM 17 WOULD LIKE TO ASK THE COURT TO DO IS THINK BACK TO EARLIER THIS

11:16AM 18 MORNING IN YOUR HONOR'S DISCUSSION OF THE MARKET HARM OPINIONS

11:16AM 19 BY MR. SEIFERT. AND THINK OF THESE TWO THINGS AS BEING

11:16AM 20 ANALOGOUS WHEN YOUR HONOR EVALUATES THEM AND EVALUATES THE

11:16AM 21 TESTIMONY.

11:16AM 22 IN THE CONTEXT OF THERE SEIFERT'S OPINION, AND I DON'T HAVE

11:16AM 23 THEM EXACTLY WRITTEN DOWN, YOUR HONOR MADE COMMENTS TO THE

11:16AM 24 EFFECT OF IF A SURVEY OF CUSTOMER IS USING THE STANDARD I WOULD

11:16AM 25 DEMAND IN A PATENT CASE FOR SOMEONE PROVING DAMAGES, NOW LET'S

11:16AM 1 BE CLEAR BY THE WAY WHEN WE ARE TALKING ABOUT LOST PROFITS, WE
11:16AM 2 ARE NOW OUT OF THE EQUITY WORLD, THIS IS ACTUAL DAMAGES WHERE
11:16AM 3 CISCO BEARS THE BURDEN OF PROOF AND THEY'VE GOT TO PROVE ACTUAL
11:17AM 4 LOST PROFITS. IT'S MUCH MORE ANALOGOUS TO A PATENT CASE.
11:17AM 5 AND YOUR HONOR SAID, I WOULD EXPECT A SURVEY WHERE YOU
11:17AM 6 ACTUALLY ASK CUSTOMERS WHAT WAS THE BASIS OF THE DECISION.
11:17AM 7 CISCO, ITSELF, WAS CRITICIZING MR. SEIFERT FOR NOT
11:17AM 8 PERFORMING A SURVEY WHERE HE ACTUALLY ASKED CUSTOMERS WHAT WAS
11:17AM 9 THE BASIS FOR DEMAND AND WHAT WAS DRIVING CUSTOMER DEMAND OR
11:17AM 10 WOULD YOU HAVE BOUGHT THIS IF IT DIDN'T HAVE A CISCO-LIKE CLI,
11:17AM 11 ET CETERA.
11:17AM 12 NOW WHEN WE GET TO DR. CHEVALIER'S OPINIONS, IT'S DIFFERENT
11:17AM 13 FROM CISCO'S PERSPECTIVE. SHE DIDN'T DO ANY SURVEY ON ANY OF
11:17AM 14 HER SCENARIOS.
11:17AM 15 SO IT'S A LITTLE BIT HARD TO UNDERSTAND HOW THEY ARE GOING
11:17AM 16 TO CRITICIZE MR. SEIFERT FOR THAT. BUT EVEN ON SCENARIOS 1 AND
11:17AM 17 2 WHERE SHE DID SOMETHING VERY SIMILAR TO WHAT MR. SEIFERT DID,
11:17AM 18 WHICH IS LOOK AT A BUNCH OF DATA, MARKETING DATA, ET CETERA AND
11:17AM 19 DRAW A CONCLUSION, WE HAVEN'T MOVED TO EXCLUDE THOSE. SHE
11:18AM 20 DIDN'T DO A SURVEY. WE HAVEN'T MOVE TO EXCLUDE THOSE. WE DO
11:18AM 21 NOT MOVE TO EXCLUDE THEM AND WE DON'T THINK THEY ARE GOOD OR
11:18AM 22 ACCURATE.
11:18AM 23 BUT WE DIDN'T MOVE TO EXCLUDE THEM BECAUSE WHAT SHE DID IN
11:18AM 24 SCENARIOS 1 AND 2, LIKE MR. SEIFERT, SHE LOOKED AT THE RECORD,
11:18AM 25 SHE LOOKED AT COMMUNICATIONS WITH CUSTOMERS, SHE LOOKED AT

11:18AM 1 MARKET DATA AND SALES ANALYSIS, AND SHE CONCLUDED PURPORTING TO
11:18AM 2 APPLY SOME EXPERTISE, SHE'S A PROFESSOR OF FINANCE AND
11:18AM 3 ECONOMICS, AND SHE SAID, IN MY OPINION, I'VE IDENTIFIED THESE
11:18AM 4 SALES THAT I THINK YOU WOULDN'T HAVE MADE IF YOU DIDN'T HAVE A
11:18AM 5 CISCO-LIKE CLI.

11:18AM 6 AGAIN, WE DON'T THINK SHE'S RIGHT, BUT WE HAVEN'T MOVED TO
11:18AM 7 EXCLUDE THEM.

11:18AM 8 SCENARIO 3, LETS BE CLEAR, IS NOTHING LIKE THAT. IT -- NOT
11:18AM 9 ONLY DOES IT NOT HAVE A SURVEY, IT DOES NOT INVOLVE ANY
11:18AM 10 APPLICATION OF PURPORTED EXPERTISE.

11:18AM 11 SO IN SCENARIO 3 SHE SAYS, I'M GOING TO CONCLUDE THAT, IN
11:19AM 12 MY SCENARIO 3 I'M GOING TO SAY ARISTA WOULD HAVE BEEN UNABLE TO
11:19AM 13 MAKE "SUBSTANTIALLY ALL OF ARISTA'S SWITCH SALES."

11:19AM 14 SO THE NUMBER, UNSURPRISINGLY, THAT SHE COMES OUT TO ON
11:19AM 15 SCENARIO 3, MUCH, MUCH BIGGER THAN SCENARIOS 1 AND 2 BECAUSE
11:19AM 16 SHE'S INCLUDING THOUSAND OF CUSTOMERS, OVER A BILLION DOLLARS
11:19AM 17 OF REVENUE, THAT'S THE BASIS OF IT, AND WHAT IS HER SUPPORT AS
11:19AM 18 A PURPORTED EXPORT FOR SAYING, I'M GOING TO OPINE TO THE JURY
11:19AM 19 IN THIS SCENARIO 3 THAT ARISTA WOULD HAVE BEEN UNABLE TO MAKE
11:19AM 20 ESSENTIALLY ALL OF ARISTA'S SWITCH SALES? IT'S THAT ARISTA
11:19AM 21 WITNESSES SAID SO. THAT'S WHAT SHE SAYS.

11:19AM 22 THERE'S A FEW SNIPPETS OF TESTIMONY THAT SHE CITES OF A FEW
11:19AM 23 ARISTA WITNESSES WHERE, WELL, MR. SO-AND-SO SAID ON HIS
11:19AM 24 DEPOSITION AT SUCH AND SUCH DATE THAT THEY WOULD HAVE HAD A
11:19AM 25 HARD TIME TELL SELLING SWITCHES IF THEY DIDN'T HAVE -- SO I'M

11:19AM 1 GOING TO ASSUME THEY ARE RIGHT. I'M GOING TO ASSUME IT'S TRUE
11:19AM 2 FOR ALL TIMES, I'M GOING TO ASSUME IT'S TRUE FOR EVERY
11:20AM 3 CUSTOMER.

11:20AM 4 NOW THERE ARE MANY, MANY PROBLEMS WITH THOSE SNIPPETS OF
11:20AM 5 TESTIMONY. THEY ARE EXPLICITLY GENERALLY TALKING ABOUT A
11:20AM 6 PARTICULAR TIME PERIOD WHICH IS OUTSIDE THE STATUTE OF
11:20AM 7 LIMITATIONS, NOT TODAY. THERE'S CLARIFICATION BY THOSE
11:20AM 8 WITNESSES THAT THEY ARE TALKING ABOUT PARTICULAR TYPES OF
11:20AM 9 CUSTOMERS THERE AND THAT OTHER TYPES OF CUSTOMER, THOSE
11:20AM 10 STATEMENT DON'T APPLY TO, ET CETERA.

11:20AM 11 BUT THE LARGER ISSUE HERE IS EXACTLY WHAT YOUR HONOR WAS
11:20AM 12 ALLUDING TO AND WHAT MR. PAK OR MR. NELSON I BELIEVE WAS
11:20AM 13 ALLUDING TO ABOUT THE PROBLEM OF HAVING AN EXPERT WHO HAS THIS
11:20AM 14 MANTEL OF AUTHORITY TALK TO A JURY AND SIMPLY ESPOUSE OPINIONS
11:20AM 15 THAT ARE NOT REALLY EXPERT OPINIONS AT ALL BECAUSE THEY HAVE A
11:20AM 16 GREATER SWAY WITH THE JURY AND THEY SEEM TO HAVE MORE
11:20AM 17 IMPORTANCE.

11:20AM 18 FOR HER TO SAY THIS ARISTA WITNESS SAID THAT THERE WOULD
11:20AM 19 BE -- THEY WOULDN'T HAVE BEEN ABLE TO SELL WITHOUT A CISCO-LIKE
11:21AM 20 CLI. SO I'M GOING TO ADOPT THAT AS MY OPINION AND I'M A
11:21AM 21 PROFESSOR FROM YALE, AND MAYBE THAT WILL COUNT AGAINST HER, BUT
11:21AM 22 WE DON'T KNOW HOW THE JURY WILL REACT, BUT I'M A PROFESSOR FROM
11:21AM 23 YALE AND MY OPINION IS THAT ARISTA COULD NOT HAVE MADE
11:21AM 24 SUBSTANTIALLY ANY OF ITS SALES WITHOUT A CISCO-LIKE CLI.

11:21AM 25 THAT TESTIMONY CAN BE VERY WEIGHTY TO THE JURY. IT COULD

11:21AM 1 HAVE A SIGNIFICANCE COMING FROM HER MOUTH THAT IT WOULDN'T HAVE
11:21AM 2 IF IT SIMPLY CAME INTO EVIDENCE.

11:21AM 3 IT'S NOT -- THE EVIDENCE ISN'T ANYTHING THE JURY NEEDS HELP
11:21AM 4 TO UNDERSTAND. IF THE WITNESS SAYS THAT THE JURY CAN HEAR THE
11:21AM 5 WITNESS SAY THAT. THEY CAN PUT ON THE STATEMENTS OF THE
11:21AM 6 WITNESSES THEY ARE TALKING ABOUT.

11:21AM 7 BUT WHAT WE BELIEVE THEY FUNDAMENTALLY CAN'T DO IS HAVE
11:21AM 8 THIS EXPERT PRESENT THAT AS ONE OF HER EXPERT OPINIONS BASED
11:21AM 9 SIMPLY ON THEY SAID SO.

11:21AM 10 THERE'S A LOT OF CASE LAW CITED IN OUR BRIEF, AND JUST WE
11:22AM 11 REVIEW SOME OF IT HERE. UNDER RULE 702, EXPERT TESTIMONY IS
11:22AM 12 HELPFUL TO THE JURY IF IT CONCERNS MATTERS BEYOND THE COMMON
11:22AM 13 KNOWLEDGE OF THE AVERAGE LAYPERSON AND IS NOT MISLEADING.

11:22AM 14 JUDGE HENDERSON SAYS BELOW, IT IS CERTAINLY TRUE THAT
11:22AM 15 EXPERT TESTIMONY THAT SIMPLY REHASHES OTHERWISE ADMISSIBLE
11:22AM 16 EVIDENCE ABOUT WHICH THE EXPERT HAS NO PERSONAL KNOWLEDGE IS
11:22AM 17 INADMISSIBLE.

11:22AM 18 AND THERE'S MORE CASE LAW AS WELL. SO AGAIN, WE DON'T
11:22AM 19 THINK SCENARIOS 1 AND 2 ARE VALID OR ACCURATE OR THEY CERTAINLY
11:22AM 20 DON'T RISE TO THE LEVEL OF THE SURVEY OR THE OTHER TYPE OF
11:22AM 21 INFORMATION THAT YOUR HONOR SAID YOU WOULD NORMALLY EXPECT, BUT
11:22AM 22 SCENARIO 3 IS IN A WHOLE OTHER CATEGORY ENTIRELY, AND IT'S OUR
11:22AM 23 OPINION, BEYOND THE CASE.

11:22AM 24 THE COURT: OKAY.

11:22AM 25 MR. PAK?

11:22AM 1 MR. PAK: I WILL BE BRIEF, YOUR HONOR.

11:22AM 2 THE COURT: I APPRECIATE THAT.

11:22AM 3 MR. PAK: OKAY. ONE CASE. STATE INDUSTRIES V. MOR

11:22AM 4 FLO. WE AGREE WHEN WE ARE LOOKING AT LOST PROFITS ANALYSIS AND

11:22AM 5 WE ARE LOOKING AT DAUBERT ISSUES, WE SHOULD BE DRAWING

11:22AM 6 ANALOGIES TO PATENT LAW.

11:22AM 7 THERE'S WELL ESTABLISHED PATENT LAW THAT DEALS WITH LOST

11:23AM 8 PROFITS, ACCEPTABLE METHODOLOGIES. ONE OF THE BLACK LETTER

11:23AM 9 METHODOLOGIES THAT AN EXPERT CAN USE TO SHOW LOST PROFITS IS

11:23AM 10 MOR FLO. MOR FLO IS A MARKET SHARE ANALYSIS, YOUR HONOR.

11:23AM 11 SO YOU TAKE AN ECONOMIST LIKE DR. CHEVALIER WHO LOOKS AT

11:23AM 12 RELATIVE MARKET SHARE, MAKES ADJUSTMENTS BASED ON THE RECORD

11:23AM 13 EVIDENCE, BASED ON HER PROFESSIONAL JUDGMENT AS TO HOW TO

11:23AM 14 ALLOCATE. BECAUSE THE QUESTION IS BUT FOR ARISTA'S INFRINGING

11:23AM 15 SALES, WHERE WOULD THOSE SALES HAVE GONE?

11:23AM 16 THE COURT: YEAH.

11:23AM 17 MR. PAK: AND YOU COULD DO IT EITHER ON AN

11:23AM 18 INDIVIDUALIZED CUSTOMER BASIS WHEN YOU HAVE A LARGE MARKET THAT

11:23AM 19 IS WELL STUDIED, AND WE HAVE TWO EXPERT FIRMS NOT CONNECTED TO

11:23AM 20 THIS CASE THAT HAVE DONE MARKET SHARE ANALYSIS, AND EVERY

11:23AM 21 WITNESS IN THIS CASE HAS SAID IS RELIABLE DATA, TO LOOK AT HOW

11:23AM 22 THE MARKET SHARE LOOKS IN THE SPECIFIC MARKETS THAT ARISTA AND

11:23AM 23 CISCO COMPETES IN, IT IS ABSOLUTELY BLACK LETTER LAW FOR HER TO

11:23AM 24 BE ABLE TO SAY AS AN EXPERT, MAKING ADJUSTMENTS FOR THE RECORD,

11:23AM 25 WHICH SHE DID IN THIS CASE, THAT X PERCENTAGE OF SALES THAT

11:24AM 1 WOULD HAVE GONE TO ARISTA BUT FOR THE INFRINGING PRODUCT, AND
11:24AM 2 EVERY ONE OF THESE EOS PRODUCTS HAS THE CLI WE ARE TALKING
11:24AM 3 ABOUT IN THIS CASE.

11:24AM 4 THE COURT: YEAH.

11:24AM 5 MR. PAK: AND THERE'S NO -- AND CONTRARY TO THE
11:24AM 6 CHARACTERIZATIONS, IT'S NOT JUST ANY WITNESS, YOUR HONOR, THE
11:24AM 7 PEOPLE I ASKED WERE THE CEO OF ARISTA, I ASKED THE SAME
11:24AM 8 QUESTIONS OF THE SENIOR VICE PRESIDENT OF CUSTOMER ENGINEERING
11:24AM 9 WHO WAS A 30(B) (6) DESIGNATED WITNESS. I ASKED THE SAME
11:24AM 10 QUESTIONS OF MR. SWEENEY WHO IS THEIR VICE PRESIDENT OF
11:24AM 11 SOFTWARE DEVELOPMENT. THEY ALL GAVE THE SAME RESPONSE. CLI --
11:24AM 12 CISCO-LIKE CLI WAS A BARRIER TO ENTRY FOR US.

11:24AM 13 THEY CANNOT ESTIMATE FOR ME HOW MANY CUSTOMERS THEY WOULD
11:24AM 14 HAVE GAINED OR LOST HAD THEY NOT HAD A CISCO-LIKE CLI. IN
11:24AM 15 FACT, THIS WHOLE DE FACTO INDUSTRY STANDARD ARGUMENT WHICH THEY
11:24AM 16 PRESENTED TO YOU AND THEY PRESSED IN THE EARLY PART OF THE CASE
11:24AM 17 WAS ALL PREDICATED ON THIS IDEA THAT WITHOUT HAVING A
11:24AM 18 CISCO-LIKE CLI, THEY COULDN'T EVEN ENTER THE MARKET.

11:24AM 19 WE KNOW THAT'S NOT TRUE BECAUSE OTHER COMPANIES LIKE
11:25AM 20 JUNIPER MADE DIFFERENT CHOICES.

11:25AM 21 BUT THEIR MARKET STRATEGY WAS GO AFTER CISCO CUSTOMERS,
11:25AM 22 COMPETE WITH SWITCHES THAT LOOK LIKE CISCO SWITCHES.

11:25AM 23 THERE'S NO EVIDENCE, AND JUST GOING TO BACK TO
11:25AM 24 MR. SEIFERT'S ARGUMENTS -- SILBERT'S ARGUMENTS ABOUT
11:25AM 25 DR. ELSTEN, NONE OF THOSE DOCUMENTS GO TO THE ISSUE OF THE

11:25AM 1 DECISIONMAKING PROCESS WITHIN CUSTOMERS.

11:25AM 2 THERE'S NO RECORD EVIDENCE AS TO HOW CUSTOMERS VALUE THESE

11:25AM 3 FEATURES WHEN THEY MAKE THE DECISION TO BUY ARISTA PRODUCTS

11:25AM 4 VERSUS OTHER PRODUCTS.

11:25AM 5 AND SO WHEN WE LOOK AT THIS QUESTION OF WHAT IS THE

11:25AM 6 EVIDENCE ON THE RECORD ABOUT CLI DEMAND DRIVING CONSUMER

11:25AM 7 DEMAND, THE RECORD EVIDENCE IS THE ONE THAT I'VE BEEN ABLE TO

11:25AM 8 ASCERTAIN FROM THEIR 30(B) (6) WITNESS, THEIR TOP EXECUTIVES AS

11:25AM 9 TO ARISTA'S MARKET STRATEGIES, HIGHLY RELEVANT.

11:26AM 10 BUT MORE IMPORTANTLY, YOUR HONOR, THE LAW DOES NOT REQUIRE

11:26AM 11 US TO DO AN INDIVIDUALIZED CUSTOMER ANALYSIS, IT DOESN'T

11:26AM 12 REQUIRE US TO DO MARKET SURVEYS WHEN WE ARE RELYING ON WELL

11:26AM 13 ESTABLISHED METHODOLOGIES SUCH AS MARKET SHARE ANALYSIS.

11:26AM 14 AND THIS IS THE SCENARIO 3 THAT DR. CHEVALIER DID FOR LOST

11:26AM 15 PROFITS.

11:26AM 16 THE COURT: SO THE MARKET SHARE ANALYSIS IS IN

11:26AM 17 ADDITION TO THE ARISTA STATEMENTS?

11:26AM 18 MR. PAK: THAT'S RIGHT, YOUR HONOR.

11:26AM 19 SO WHAT WE HAVE -- THIS IS NOT JUST SIMPLY VOUCHING THE

11:26AM 20 TESTIMONY OF ARISTA, SHE THEN TAKES MARKET DATA THAT SHE'S

11:26AM 21 WELL-TRAINED TO ANALYZE. SHE TAKES THE -- SHE MAKES

11:26AM 22 CORRECTIONS AND ADJUSTMENTS GIVEN THE FACTUAL RECORD, AND

11:26AM 23 SPECIFICALLY, SHE ALLOWS FOR THE POSSIBILITY THAT 20 PERCENT OF

11:26AM 24 THE CUSTOMERS MAY PREFER LINUX RATHER THAN CLI, BASED ON THE

11:26AM 25 TESTIMONY OF ONE OF THEIR CHIEF EXECUTIVES, MAKES CORRECTIONS,

11:26AM 1 THEN PROVIDES THE MARKET SHARE ANALYSIS.

11:26AM 2 THIS IS BLACK LETTER LAW. AND THIS IS SHELDON V. MGM,

11:26AM 3 ANOTHER CASE THAT ADOPTS APPORTIONMENT FROM PATENT LAW TO

11:26AM 4 COPYRIGHT CASES. WE HAVE JARVIS V. K2, ACTUAL DAMAGES

11:27AM 5 CALCULATED AS TO WHAT A WILLING BUYER WOULD HAVE PAID A WILLING

11:27AM 6 SELLER. AND ALSO ADOPTING THIS LOST PROFITS MARKET SHARE

11:27AM 7 ANALYSIS.

11:27AM 8 SO IT'S A QUESTION TO THE EXTENT THAT THEY HAVE, THEY THINK

11:27AM 9 CONFLICTING TESTIMONY FROM THEIR OWN WITNESSES ABOUT THE

11:27AM 10 IMPORTANCE OF CLI AT DIFFERENT TIME PERIODS. THAT'S TYPICAL

11:27AM 11 MATERIAL FOR CROSS-EXAMINATION AND DIRECT EXAMINATION AT TRIAL.

11:27AM 12 BUT IN TERMS OF METHODOLOGY, YOUR HONOR, THAT CASE IS NOT

11:27AM 13 CONTESTED IT ESTABLISHES MARKET SHARE ANALYSIS.

11:27AM 14 MR. SILBERT: MAY I HAVE 60 SECONDS ON MARKET SHARE?

11:27AM 15 THE COURT: SURE.

11:27AM 16 MR. SILBERT: AS YOUR HONOR KNOWS, THERE ARE THREE

11:27AM 17 STEPS IN A LOST PROFITS ANALYSIS.

11:27AM 18 STEP 1 IS YOU WOULD NOT HAVE MADE THIS SALE, YOU THE

11:27AM 19 DEFENDANT, BUT FOR YOUR INFRINGEMENT. THAT'S THE FIRST THING

11:28AM 20 TO PROVE. WHAT SALES WOULD YOU NOT HAVE MADE HAD YOU NOT

11:28AM 21 INFRINGED.

11:28AM 22 THE SECOND STEP IS, IF YOU, THE DEFENDANT, HAD NOT MADE

11:28AM 23 THAT SALE, WE, THE PLAINTIFF, WOULD HAVE MADE THAT SALE OR SOME

11:28AM 24 PORTION OF THOSE SALES.

11:28AM 25 AND THEN THE THIRD STEP IS, IF WE MADE THOSE SALES, HERE'S

11:28AM 1 HOW MUCH PROFIT WE WOULD HAVE MADE ON THOSE SALES AND NOW YOU
11:28AM 2 HAVE TO GIVE US THAT PROFIT.

11:28AM 3 THE MARKET SHARE ANALYSIS, IT IS APPLIED IN STEP NUMBER 2,
11:28AM 4 THAT MR. PAK WAS TALKING ABOUT. IN OTHER WORDS, AND THEN SHE
11:28AM 5 ALSO APPLIES SOME ACCOUNTING AND MATH IN STEP NUMBER 3.

11:28AM 6 SHE USES THE SAME MARKET SHARE ANALYSIS AND THE SAME MATH
11:28AM 7 IN HER SCENARIOS 1 AND 2. THE PROBLEM WITH HER SCENARIO 3 IS
11:28AM 8 IN STEP 1, BECAUSE WHEREAS IN SCENARIOS 1 AND 2 SHE LOOKS AT A
11:28AM 9 BUNCH OF DATA, PURPORTS AT LEAST TO APPLY SOME EXPERTISE AND
11:28AM 10 SAYS, I'VE IDENTIFIED THESE SALES THAT IN MY EXPERT OPINION I
11:28AM 11 THINK YOU WOULD NOT HAVE MADE, THAT THOSE ARE SCENARIOS 1 AND
11:29AM 12 2.

11:29AM 13 IN SCENARIO 3 SHE DOESN'T. AND THAT'S WHAT THE WHOLE
11:29AM 14 OPINION HINGES ON. SHE STARTS WITH SAYING IN STEP 1 YOU WOULD
11:29AM 15 NOT HAVE MADE SUBSTANTIALLY ALL OF YOUR SWITCH SALES
11:29AM 16 SUBSTANTIALLY ALL, THOSE ARE HER WORDS. AND HOW DO I KNOW
11:29AM 17 THAT? BECAUSE SO-AND-SO SAID SO. THAT'S THE ONLY BASIS, THE
11:29AM 18 ONLY BASIS.

11:29AM 19 AND THAT'S THE PROBLEM. EVERYTHING ELSE IS ANCILLARY TO
11:29AM 20 THAT.

11:29AM 21 THE COURT: SO THE MARKET SHARE ANALYSIS IS ONLY IN
11:29AM 22 STEP 2.

11:29AM 23 MR. SILBERT: IT'S THE TAIL ON THE DOG, TO SAY THE
11:29AM 24 LEAST. EXACTLY.

11:29AM 25 MR. PAK: YOUR HONOR, JUST QUICKLY, THIS IS EXACTLY

11:29AM 1 STATED IN MOR FLO. INSTEAD OF DOING AN INDIVIDUALIZED BUT FOR
11:29AM 2 ANALYSIS, THAT CASE LAW ALLOWS INTELLECTUAL PROPERTY OWNERS TO
11:29AM 3 ESTABLISH ALL THE PRONGS OF LOST PROFITS BY LOOKING AT MARKET
11:29AM 4 SHARE AND MAKING REASONABLE ASSUMPTIONS ABOUT WHAT ARE THE
11:29AM 5 MARKET WILL TELL YOU.

11:29AM 6 THE COURT: I WILL TAKE A LOOK AT THAT.

11:29AM 7 OKAY. WE ARE DOING PRETTY WELL. WE ARE GOING TO MOVE ON
11:29AM 8 THEN TO THE LAST ONE WHICH IS DR. CLARK. AND I DON'T THINK I
11:30AM 9 MADE ANY COMMENTS ABOUT DR. CLARK WHEN I STARTED. DR. CLARK
11:30AM 10 GOT CAUGHT IN THE TIME SCHEDULE HERE, AS DID CISCO'S EXPERT.

11:30AM 11 SO IT'S CERTAINLY --

11:30AM 12 MR. SILBERT: I DON'T WANT TO DENY MR. JAFFE HIS
11:30AM 13 MOMENT IN THE SUN. I THINK WE WOULD BE HAPPY TO SUBMIT IT ON
11:30AM 14 THE PAPERS, AS IT IS A SIMPLE ISSUE.

11:30AM 15 MR. JAFFE: IF YOU HAVE ANY QUESTIONS.

11:30AM 16 THE COURT: LET ME JUST STATE WHAT I THINK I'VE
11:30AM 17 GLEANED AND THEN YOU CAN CORRECT ME. I DON'T WANT YOU TO MISS
11:30AM 18 THE OPPORTUNITY TO SET ME STRAIGHT ON IT.

11:30AM 19 MR. JAFFE: CERTAINLY.

11:30AM 20 THE COURT: CLEARLY, DR. CLARK CAN ONLY TESTIFY
11:30AM 21 OPINIONS THAT ARE CONSISTENT WITH THE COURT'S ACTUAL CLAIMS
11:30AM 22 CONSTRUCTION. SO THAT WILL BE A LIMITATION. I DON'T THINK
11:30AM 23 THAT'S A REMARKABLE STATEMENT HERE.

11:30AM 24 I WOULD ALLOW HIM TO TESTIFY AS TO ANY OPINIONS THAT ARE IN
11:30AM 25 HIS REPORT, AND TO THE EXTENT THAT HE GAVE AN OPINION ON

11:31AM 1 ALTERNATE PROPOSED CONSTRUCTIONS AND GOT IT, AND HAD AN OPINION
11:31AM 2 ON ONE I ADOPTED, THEN HE'S FINE.

11:31AM 3 TO THE EXTENT AT HIS DEPOSITION HE ULTIMATELY GAVE AN
11:31AM 4 OPINION BASED ON THE, MY CLAIMS CONSTRUCTION WHICH WAS ONLY A
11:31AM 5 COUPLE OF DAYS EARLIER, I WOULD ALLOW THAT.

11:31AM 6 AND HERE'S WHERE THE PROBLEM COMES IN, AND MAYBE YOU CAN
11:31AM 7 HELP ME OUT. IT'S ARGUED THAT FOR THE TWO TERMS THAT I CHANGED
11:31AM 8 OR THAT -- I CAN'T REMEMBER HOW THEY WERE CHANGED, BUT FOR
11:31AM 9 THOSE TWO TERMS, TO THE EXTENT HE WOULD SAY THAT HIS OPINION,
11:31AM 10 ALTHOUGH NOT INCORPORATING EXPRESSLY MY CLAIMS CONSTRUCTION, IS
11:31AM 11 NOT AFFECTED MATERIALLY BY THE DIFFERENCE. THAT'S WHERE THE
11:31AM 12 ISSUE IS HERE.

11:31AM 13 I ACTUALLY WOULD ALLOW HIM, I'M INCLINED TO ALLOW HIM TO
11:31AM 14 TESTIFY AND EXPLAIN WHY HIS OPINION, ALTHOUGH NOT EXPRESSLY
11:32AM 15 INCORPORATING MY CONSTRUCTION, IS CONSISTENT WITH MY
11:32AM 16 CONSTRUCTION. AND HE WILL HAVE TO TALK HIMSELF OUT INTO THAT.
11:32AM 17 BUT THAT'S WHAT I WOULD LET HIM DO.

11:32AM 18 SO TELL ME WHY I SHOULD NOT, OR MAYBE YOU HAVE NO OBJECTION
11:32AM 19 TO THAT.

11:32AM 20 MR. JAFFE: SO I THINK THERE'S TWO POINTS.

11:32AM 21 FIRST, ON THE FIRST ISSUE WHICH IS FOR THE CONSTRUCTIONS
11:32AM 22 THAT THE COURT ADOPTED THAT WERE NOT PROPOSED BY EITHER PARTY,
11:32AM 23 DR. CLARK ADMITTED IN HIS DEPOSITION THAT THAT DOES AFFECT HIS
11:32AM 24 OPINIONS.

11:32AM 25 THE COURT: OKAY, YEAH.

11:32AM 1 MR. JAFFE: AND SO THE ULTIMATE CONCLUSION THAT HE
11:32AM 2 REACHES AS TO WHETHER SOMETHING IS OBVIOUS OR WHETHER SOMETHING
11:32AM 3 IS ANTICIPATED, IS THEREFORE FAULTY AS A GENERALLY MATTER. SO
11:32AM 4 HE DOESN'T HAVE ANY OPINIONS ON THE ULTIMATE ISSUES AS TO
11:32AM 5 ANTICIPATION OR OBVIOUSNESS THAT APPLY THE COURT'S
11:32AM 6 CONSTRUCTION.

11:32AM 7 SO IT'S NOT THE CASE THAT WE COULD LOOK AT HIS REPORT AND
11:32AM 8 PUZZLE TOGETHER THE OPINIONS THAT HE WOULD HAVE HAD.

11:32AM 9 THE COURT: THAT'S YOUR VIEW, AND OF COURSE
11:32AM 10 MR. SILBERT, IS THIS YOUR BAILIWICK AS WELL?

11:33AM 11 I WILL HEAR FROM HIM AS TO WHETHER IN THE DEPOSITION
11:33AM 12 DR. CLARK ACTUALLY SAID WELL, EVEN THOUGH I DIDN'T APPLY THAT
11:33AM 13 CONSTRUCTION, IT DOESN'T CHANGE MY OPINION. I THINK THAT MAY
11:33AM 14 BE WHERE WE ARE.

11:33AM 15 SO YOU DON'T OBJECT, OBVIOUSLY THIS IS ONLY ABOUT THE TWO
11:33AM 16 INSTANCES WHERE THE PARTIES DIDN'T KNOW WHICH WAY I WAS GOING
11:33AM 17 AND, BECAUSE I DIDN'T PICK YOUR SUGGESTIONS.

11:33AM 18 MR. JAFFE: IT MIGHT BE HELPFUL TO GIVE AN EXAMPLE.

11:33AM 19 SO I PULLED UP SLIDE 5 HERE.

11:33AM 20 THE COURT: OKAY.

11:33AM 21 MR. JAFFE: AND SO THIS IS DURING DR. CLARK'S
11:33AM 22 DEPOSITION. AND I READ TO HIM YOUR REPORT AND I SAID, IS THIS
11:33AM 23 YOUR OPINION? AND HE SAYS NO, IT'S NOT MY OPINION ANYMORE.

11:33AM 24 THE COURT: OKAY.

11:33AM 25 MR. JAFFE: SO IT WASN'T THE CASE WHERE HIS OPINION

11:33AM 1 STILL HOLDS.

11:33AM 2 THE COURT: ALL RIGHT.

11:33AM 3 MR. JAFFE: BUT IT'S -- INSTEAD, THE OPINION IS

11:33AM 4 FAULTY.

11:33AM 5 AND THE OTHER THING I WANTED TO ADD IN ADDITION, IS EVEN

11:33AM 6 UNDER THE COURT'S CONSTRUCTION, DR. CLARK DID A NEW OPINION

11:33AM 7 THAT WE DON'T THINK IS ADMISSIBLE, BUT TO THE EXTENT THE COURT

11:34AM 8 IS WILLING TO HEAR IT, THE NEW OPINION SAYS EVEN READING THE

11:34AM 9 COURT'S CLAIM CONSTRUCTION, I STILL DON'T HAVE ANY OPINIONS.

11:34AM 10 UNDER HIS VIEW OF THE CLAIM CONSTRUCTION ORDER, THERE IS NO

11:34AM 11 INVALIDITY OPINIONS TO OFFER. SO THIS IS EVEN --

11:34AM 12 THE COURT: BUT HE'S LOCKED INTO HIS TESTIMONY.

11:34AM 13 MR. JAFFE: THAT'S RIGHT.

11:34AM 14 THE COURT: I DON'T HAVE A PROBLEM WITH THAT. IF HE

11:34AM 15 SAYS I DON'T HAVE AN OPINION THEN HE CAN'T OFFER ONE AT TRIAL.

11:34AM 16 MR. JAFFE: RIGHT.

11:34AM 17 SO WE ARE MOVING, BECAUSE HIS ULTIMATE CONCLUSION, IF HE

11:34AM 18 WERE TO GET UP ON THE WITNESS STAND AND SAY, I THINK THIS IS

11:34AM 19 ANTICIPATED, I THINK THIS IS RENDERED OBVIOUS, THAT CONCLUSION

11:34AM 20 WOULD BE A FAULTY CONCLUSION TO OFFER BECAUSE THE ONLY

11:34AM 21 TESTIMONY THAT'S BEEN DISCLOSED, THE ONLY OPINIONS THAT HAVE

11:34AM 22 BEEN DISCLOSED ARE UNDER THE WRONG CONSTRUCTIONS.

11:34AM 23 SO IF HE WOULD GET UP AND TESTIFY AS TO THE ULTIMATE

11:34AM 24 CONCLUSIONS ON VALIDITY, THAT WOULD BE INADMISSIBLE UNDER 702.

11:34AM 25 THE COURT: SO I THINK MAYBE -- I DO UNDERSTAND WHAT

11:34AM 1 YOU ARE SAYING. HE MAY NOT TESTIFY AS TO OPINIONS NOT OFFERED
11:35AM 2 IN HIS REPORT OR HIS DEPOSITION.

11:35AM 3 SO HERE WHERE YOU ARE SHOWING ME HE SAID I HAVE NO OPINION,
11:35AM 4 I WOULD NOT ALLOW HIM TO COME IN AT TRIAL WITH AN OPINION. SO
11:35AM 5 THAT'S PRETTY BASIC THOUGH.

11:35AM 6 I MEAN, THAT'S -- AND YOU OF COURSE, SHOULD HE GO INTO THAT
11:35AM 7 AREA, YOU WOULD OBJECT, YOU WOULD SHOW ME HIS DEPOSITION
11:35AM 8 TESTIMONY. IT'S, YOU KNOW, I NEVER CAN HAVE FULL COMMAND OF
11:35AM 9 THE EXPERT REPORT SO THIS IS TYPICAL. THAT'S NOT A
11:35AM 10 PARTICULARLY DIFFICULT RULING TO MAKE.

11:35AM 11 THEN WE WILL SEE WHAT HE'S ACTUALLY ASKED TO OPINE ON
11:35AM 12 BECAUSE I CAN'T FORECLOSE A PARTICULAR QUESTION, I DON'T KNOW
11:35AM 13 WHAT IT WILL BE. AND YOU WILL JUST HAVE TO BE -- I CAN GIVE A
11:35AM 14 HIGH LEVEL RULING HERE THAT HE'S LIMITED TO THE OPINIONS HE'S
11:35AM 15 OFFERED IN HIS REPORTS AND IN HIS DEPOSITION AND NO MORE.

11:35AM 16 MR. JAFFE: WELL, I THINK IF I CAN BACK UP --

11:35AM 17 THE COURT: SO YOU WANT A LITTLE MORE PROTECTION.

11:35AM 18 MR. JAFFE: I AGREE WITH EVERYTHING YOUR HONOR JUST
11:35AM 19 SAID.

11:35AM 20 BUT I THINK IF YOU BACK UP AND LOOK AT THE LEGAL STANDARD
11:36AM 21 WE ARE LOOKING AT HERE FROM A DAUBERT PERSPECTIVE, WHICH IS
11:36AM 22 TESTIMONY FROM A TECHNICAL EXPERT THAT'S BASED ON THE WRONG
11:36AM 23 CONSTRUCTION, IS NOT RELEVANT AND SHOULD BE EXCLUDED.

11:36AM 24 SO WE AGREE FROM A DISCLOSURE POINT OF VIEW THAT THERE ARE
11:36AM 25 NO OPINIONS, BUT ADDITIONALLY UNDER 702 THESE OPINIONS ARE NOT

11:36AM 1 RELEVANT BUT THEY ARE ALSO NOT RELIABLE OR HELPFUL TO THE JURY
11:36AM 2 BECAUSE THEY ARE BASED ON THE WRONG CONSTRUCTIONS.

11:36AM 3 THE COURT: OKAY. AND I THINK THAT'S A FAIR
11:36AM 4 STATEMENT OF THE LAW.

11:36AM 5 I DON'T THINK -- I WOULD BE SURPRISED IF ARISTA WAS GOING
11:36AM 6 TO OFFER AN OPINION BASED ON A CONSTRUCTION I DIDN'T ADOPT.

11:36AM 7 MR. JAFFE: SO I THINK THE SUM TOTAL IS THERE'S
11:36AM 8 NOTHING LEFT FOR DR. CLARK --

11:36AM 9 THE COURT: THAT'S NOT FOR ME TO SAY.

11:36AM 10 I MEAN, THAT'S TOO BIG FOR ME TO RULE THAT HE CAN'T TESTIFY
11:36AM 11 AT ALL. I NEED TO MAKE THESE RULINGS MORE NARROWLY FOCUSED, AS
11:36AM 12 WAS YOUR MOTION.

11:36AM 13 MR. JAFFE: ABSOLUTELY.

11:36AM 14 THE COURT: THE RESULT MAY BE WHAT YOU ARE SUGGESTING
11:36AM 15 IS THERE'S NOTHING MORE FOR HIM TO SAY, BUT I'M NOT GOING TO
11:36AM 16 PARSE THROUGH HIS ENTIRE REPORT TO MAKE THAT DETERMINATION.

11:37AM 17 MR. JAFFE: FAIR ENOUGH.

11:37AM 18 AND THEN AS TO THE LAST POINT WHICH IS HIS OWN OPINION HERE
11:37AM 19 ON SLIDE 6, IS THAT EVEN READING THE CLAIM CONSTRUCTION ORDER,
11:37AM 20 HE DOESN'T HAVE ANY NEW VALIDITY OPINIONS TO OFFER.

11:37AM 21 SO THAT'S KIND OF WHERE WE ARE LEFT IN TERMS OF WHAT DOES
11:37AM 22 HE HAVE TO OFFER THE JURY THAT'S RELEVANT.

11:37AM 23 BUT UNLESS YOU HAVE ANYTHING FURTHER.

11:37AM 24 THE COURT: MR. SILBERT, LET'S SEE WHAT AREA OF
11:37AM 25 DISAGREEMENT WE HAVE HERE.

11:37AM 1 MR. SILBERT: I DON'T THINK WE DISAGREE AT ALL WITH
11:37AM 2 WHAT YOUR HONOR SAID, AND I THINK WE ARE FINE WITH THE TYPE OF
11:37AM 3 RULING THAT YOUR HONOR ARTICULATED.

11:37AM 4 JUST TO CLARIFY, WHAT DR. CLARK SAID WAS, NOW READING THE
11:37AM 5 COURT'S CLAIM CONSTRUCTION, THERE ARE WAYS IN WHICH I DON'T
11:37AM 6 THINK THAT THE PRIOR ART ACTUALLY PRACTICES THE CLAIM, BUT IT
11:37AM 7 IS HIS OPINION THAT THE PRIOR ART WORKS THE SAME WAY THAT
11:37AM 8 ARISTA'S PRODUCT DOES.

11:37AM 9 SO WHAT HE SAYS IS, THE WAY THAT I WOULD READ THIS
11:37AM 10 CONSTRUCTION, I DON'T THINK IT WOULD READ ON THIS, BUT I AM
11:38AM 11 OPINING THAT THIS, IN THE PRIOR ART, IS THE SAME AS WHAT
11:38AM 12 ARISTA'S PRODUCT DOES.

11:38AM 13 SO IF SOMEBODY DISAGREED WITH ME, THEN THEY MIGHT DISAGREE
11:38AM 14 WITH ME. BUT THOSE ARE HIS OPINIONS.

11:38AM 15 THE COURT: SO I'M A LITTLE LOST. I'M JUST TRYING TO
11:38AM 16 UNDERSTAND.

11:38AM 17 THE ARISTA'S PRODUCT PRACTICES THE PRIOR ART, BUT HE HAS NO
11:38AM 18 OPINION AS TO WHETHER THE PRIOR ART INVALIDATES THE '526
11:38AM 19 PATENT; IS THAT CORRECT?

11:38AM 20 MR. SILBERT: WHAT HE SAYS IS, IN CERTAIN RESPECTS,
11:38AM 21 IF ARISTA'S PRODUCT DOES, IF THIS WERE CONSIDERED TO BE
11:38AM 22 PRACTICING THIS LIMITATION, THEN IT'S CLEARLY DISCLOSED IN THE
11:38AM 23 PRIOR ART. THAT'S WHAT HE SAYS.

11:38AM 24 MR. JAFFE: YOUR HONOR, IF I MAY ADDRESS THAT FOR A
11:38AM 25 MOMENT --

11:38AM 1 THE COURT: THAT MAKES MY HEAD HURT A LITTLE BECAUSE
11:38AM 2 HE'S BASICALLY SAYING IF THE JURY FINDS INFRINGEMENT THEN IT'S
11:38AM 3 OBVIOUS -- I'M NOT SURE WHERE THAT -- I'M NOT SURE I UNDERSTAND
11:39AM 4 THAT.

11:39AM 5 MR. SILBERT: THAT'S ONLY WITH RESPECT TO I THINK ONE
11:39AM 6 LIMITATION. HE HAS LOTS OF OTHER OPINIONS ABOUT THE OTHERS.

11:39AM 7 THE COURT: SURE, SURE.

11:39AM 8 MR. SILBERT: I THINK THE SUM TOTAL OF IT IS WE DON'T
11:39AM 9 DISAGREE WITH ANYTHING YOUR HONOR SAYS.

11:39AM 10 HE'S LIMITED TO WHAT HE SAID, THE OPINIONS HE EXPRESSED IN
11:39AM 11 HIS DEPOSITION.

11:39AM 12 THE COURT: AND HE CAN'T TESTIFY AS TO OPINIONS THAT
11:39AM 13 ARE NOT BASED ON THE COURT'S ACTUAL CONSTRUCTIONS.

11:39AM 14 MR. SILBERT: SURE, NOR WOULD WE ASK HIM TO.

11:39AM 15 THE COURT: I THINK THAT GIVES YOU THE RULING YOU ARE
11:39AM 16 LOOKING FOR.

11:39AM 17 MR. JAFFE: YES, WITH THE CAVEAT THAT IF DR. CLARK
11:39AM 18 SHOWS UP AND SAYS, I HAVE DISCLOSED OPINIONS THAT IT'S INVALID,
11:39AM 19 THOSE AREN'T IN HIS REPORT, BASED ON THE COURT'S CONSTRUCTIONS.

11:39AM 20 THE COURT: AND THAT WOULD NOT -- THAT'S AN
11:39AM 21 UNFORTUNATE PART OF THE TRIAL EXERCISE IS THAT MID-TRIAL YOU
11:39AM 22 ARE SCURRYING THROUGH THE REPORTS AND DEPOSITIONS AND I AM AT
11:39AM 23 YOUR MERCY TO SHOW THEM TO ME.

11:39AM 24 IT'S ONE OF THE MOST DIFFICULT RULINGS THAT I HAVE TO MAKE
11:39AM 25 DURING TRIAL BECAUSE I DON'T HAVE COMMAND OF THE REPORTS AND I

11:40AM 1 COULD NEVER.

11:40AM 2 SO BE FOREWARNED THAT WHEN YOU OFFER DR. CLARK FOR A

11:40AM 3 CERTAIN OPINION, THAT YOU HAVE TO BE READY TO PULL OUT AND SHOW

11:40AM 4 ME THAT IT'S THERE. BECAUSE IF YOU CAN'T SHOW IT TO ME, WE ARE

11:40AM 5 DONE.

11:40AM 6 MR. SILBERT: ABSOLUTELY.

11:40AM 7 THE COURT: AND THAT'S THE WAY IT GOES, THAT'S JUST

11:40AM 8 COMMON.

11:40AM 9 SO I THINK MY RULING WILL BE AT THIS MORE GENERIC LEVEL,

11:40AM 10 AND OF COURSE CISCO WILL HAVE TO BE VIGILANT IN POSING THOSE

11:40AM 11 OBJECTIONS, BUT I CAN'T GET INTO DEEPER AND PARSE EACH LINE OF

11:40AM 12 HIS DEPOSITION TO SAY THIS IS IN AND THIS IS OUT. I DON'T

11:40AM 13 ACTUALLY KNOW WHICH ONES YOU WILL OFFER. SO IT'S JUST NOT WHAT

11:40AM 14 I WOULD DO.

11:40AM 15 SO I THINK, IN A SENSE, CISCO IS GOING TO WIN THIS ONE, BUT

11:40AM 16 IT'S ONLY WINNING A BATTLE AND THE WAR IS STILL TO BE FOUGHT ON

11:40AM 17 SO MANY THINGS.

11:40AM 18 MR. SILBERT: THANK YOU, YOUR HONOR.

11:40AM 19 MR. PAK: THANK YOU, YOUR HONOR.

11:41AM 20 THE COURT: ALL RIGHT. GOOD. THAT WAS PRETTY GOOD.

11:41AM 21 HERE'S WHAT I WOULD LIKE TO DO, I THINK WE HAVE COVERED ALL

11:41AM 22 OF THE DAUBERT MOTIONS, AND I WILL THEN -- I THINK WE HAVE

11:41AM 23 WORKED THROUGH A LOT OF IT, SO I'M REALLY FEELING LIKE THIS IS

11:41AM 24 GOING TO MOVE ALONG PRETTY WELL BASED ON THE EXCELLENT WORK

11:41AM 25 THAT YOU'VE DONE TO PRESENT IT TO ME, AND I THANK YOU FOR THAT.

11:41AM 1 I WOULD LIKE TO TAKE JUST A FIVE-MINUTE BREAK AND THEN I
11:41AM 2 WOULD LIKE TO SEE COUNSEL IN CHAMBERS. I JUST WANT TO DO SOME
11:41AM 3 OF THE PLANNING AND HOUSEKEEPING DISCUSSION.

11:41AM 4 I DON'T ACTUALLY WANT IT ON THE RECORD, AND IT WOULD BE
11:41AM 5 ATTORNEYS ONLY. I KNOW YOU MAY HAVE SOME CLIENT
11:41AM 6 REPRESENTATIVES HERE, BUT WE ARE JUST GOING TO TALK ABOUT THE
11:41AM 7 TRIAL PREP ITSELF.

11:41AM 8 SO LET'S TAKE FIVE MINUTES, THEN I WILL SEE YOU IN
11:41AM 9 CHAMBERS.

11:41AM 10 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER
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8 I, THE UNDERSIGNED OFFICIAL COURT
9 REPORTER OF THE UNITED STATES DISTRICT COURT FOR
10 THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
11 FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
12 CERTIFY:

13 THAT THE FOREGOING TRANSCRIPT,
14 CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
15 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
16 SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
17 HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
18 TRANSCRIPTION TO THE BEST OF MY ABILITY.

19
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23
24
25 
 SUMMER A. FISHER, CSR, CRR
 CERTIFICATE NUMBER 13185

DATED: 9/12/16